Supreme

Richard H.

vs.

Barber Ass

Barber Ass

vs.

Richard H.

BRIEF

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

RICHARD H. FIELD,
Appellant,
vs.
BARBER ASPHALT PAVING COMPANY,
Respondent.
} Term No. 201. File No. 18797.

BARBER ASPHALT PAVING COMPANY,
Appellant,
vs.
RICHARD H. FIELD,
Respondent.
} Term No. 202. File No. 18798.

Appeals from the Western Division of the Western District of Missouri.

CONCISE STATEMENT OF THE CASE.

The above are cross appeals of complainant and defendant from a judgment and decree in a suit in equity in the United States Circuit Court at Kansas City, in and for the Western Division of the Western District of Missouri. (See printed record, page 35).* The Honorable Smith McPherson of Red Oak, Iowa, of the Federal District Court of Iowa,

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* The figures in parenthesis, after paragraphs hereinafter set forth, are the pages of the printed record prepared and filed in this case by the clerk of this court.

acted as judge of the trial court in this case and rendered the judgment and decree, from which these appeals were allowed (see page 23).

Suit to Cancel Special Tax-bills, etc. The case is this: On January 4th, 1900, Richard H. Field, as complainant, filed a bill in equity in the United States Circuit Court at Kansas City, Mo,, against the Barber Asphalt Paving Company, as defendant, praying the court to cancel and adjudge void, etc., as clouds on the title to complainant's lands in the late city of Westport, Mo., now in Kansas City, Mo., 17 special tax-bills aggregating, exclusive of interest and costs, the sum of $3,376.45, purporting to have been issued by the city of Westport, as a Missouri fourth-class city, to the defendant paving company, for paving done by defendant on Main St., Baltimore Ave., and Wyandotte St. in said city of Westport.

(See complainant's bill, printed record, page 1).

Allegations of the Bill, The allegations of complainant's bill, as amended, omitting the parts not here involved, are as follows:

"*First.* Complainant is a resident of Kansas City, in the Western Division of the Western Judicial District of the State of Missouri, and a citizen of said state, and that defendant is now and was at the times hereinafter named a citizen, and a duly created, organized corporation of the state of West Virginia, and engaged in street paving in Kansas City, Missouri (page 1).

"*Second.* (1) Complainant owns and owned at the times hereinafter named, the following described real estate in Jackson county, Missouri, to-wit: lots 1, 2, 7 and 8 in block 39; also lots 3 and 4 in block 41; also lot 1 in block 49; also the south 15 17-100 ft. of lots 1 and 2 in block 50; also an undivided one-half of lots 1, 2, 3, 4, 5, 8, 9 and 10 in block 45, all in "Hyde Park", a platted addition on file and recorded in the office of the recorder of deeds in Jackson county, Missouri, at Kansas City, (page 1).

(2) Which real estate was, when the pavements hereinafter mentioned, ~~ordered and~~ were contracted for and done, in the corporate limits of Westport, Missouri (page 1).

(3) The city of Westport was then duly incorporated and duly acting as a city of the 4th class in the state of Missouri under an act of the General Assembly of said state, entitled "An act to repeal article V, chapter 30, of the Revised Statutes of Missouri of 1889, and certain amendments thereto; said article V being entitled 'cities of the fourth-class,' and to enact in lieu thereof a new article providing for government of cities of the fourth-class," approved April 11th, 1895 (page 1).

(4) That on December 2nd, 1897, said city of Westport ceased to exist and the real estate aforesaid of complainant has been since then within the corporate limits of Kansas City, Missouri, by virtue of the extension of the territorial limits of said Kansas City, duly made on that day whereby the whole of the territory of said city of Westport was included within the corporate territorial limits of Kansas City. (page 2).

"*Third.* (1) The defendant is the owner and holder of certain instruments of writing purporting to be special tax-bills issued October 5th, 1897, and November 18th, 1897, to it by said late city of Westport, against said lots respectively according to their frontage on and for the paving hereinafter mentioned on Main street, from the center line of Springfield avenue or 31st street to the north line of Westport avenue; Baltimore avenue from Hunter avenue to the north line of Westport avenue; Wyandotte street from the south line of Hunter avenue to the north line of Westport avenue in said city of Westport, amounting in the aggregate to the sum of $3,376.45, exclusive of interest and costs (page 2).

(2) And the defendant claims that the said special tax-bills are liens respectively on and against the real estate aforesaid (page 2).

"*Fourth.* (1) All of the real estate aforesaid is vacant and unimproved, and the greater part of the other land fronting on the street pavements aforesaid ~~is~~ are vacant and unimproved and unto at the times named herein (page 2).

(2) That complainant was not at any time herein named a resident of said city of Westport, but was at all

the times herein named a resident of Kansas City, Missouri, and the owner of the real estate hereinbefore described. That sections 88 and 95, inclusive, of the Act of the General Assembly of the state of Missouri, aforesaid, under which the tax-bills in question are claimed by the defendant as liens upon the complainant's real estate, deprive the complainant of his said real estate without due process of law, and deny the complainant the equal protection of the laws afforded to resident owners of property in said city of Westport, and take his property for the private use of said residents, and violate section 1 of the 14th amendment to the Constitution of the United States (page 2).

"*Fifth.* (1) The tax-bills aforesaid issued to the defendant for the paving aforesaid on Baltimore avenue were dated November 18th, 1897, and against the lots described in charge "second" of this bill, in amounts as follows:

Against lot 7 block 39	50 ft. front	....	$141.96
" " 8 "	60 " "	.....	170.35
" " 8 "	50 " "	.....	132.92
" " 9 "	" " "	.....	132.90
" "10 "	" " "	.....	132.92
" " 1 "	98 52-100 " "	.....	180.00
" S 15 17-100 ft. lot 2 blk 50 15 17-100"		.....	43.07

Total assessed against above lots for Baltimore avenue paving (pages 2 and 3) $934.14

(2) That the tax-bills aforesaid issued to defendant for the paving aforesaid on Wyandotte street was dated November 18th, 1897, and against lots described in charge "second" of this bill in amounts as follows:

Against Lot 3 Block 41	50 ft. front	.....	$172.68
" " 4 "	" " " "	.....	172.68
" " 1 "	49 98-78 ft. front	.....	358.08

Total assessed against above lots for Wyandotte street paving, (page 3) $703.44

(3) That the tax bills aforesaid issued to defendant for the paving aforesaid on Main street were dated October

5th, 1897, and are against lots described in charge "Second" of this bill, in amounts as follows:

Against Lot	1	Block 39	60 ft.	front	$266.13
" "	2	" "	50 ft.	"	221.77
"S. 15ft	1	"	50 15 ft.	"	66.50
" Lot	1	"	45 50 ft.	"	232.23
" "	2	" "	" "	"	232.23
" "	3	" "	" "	"	232.23
" "	4	" "	" "	"	232.23
" "	5	"	55.05 "	"	255.55

Total assessed against lots for Main street paving (page 3).....$1736.87

"*Sixth*—(1) For the purpose of forestalling any remonstrance from the residents of the city of Westport owning property fronting on such pavements before any plans or specifications for them, or either of them, were made and filed in said city of Westport, and before any resolution or ordinance ordering such streets, or either of them, to be paved were passed, the defendant circulated among such residents a petition in each case asking the board of aldermen of said city of Westport to cause such work to be done, and induced the said residents of said late city of Westport to sign said petition, and to refrain from remonstrating against such improvements (page 3). (The part of this charge of the bill, next following the above, and here omitted; is omitted for the reason that there is no error assigned thereon).

(2) And thereupon defendant caused to be drawn plans and specifications, resolutions and ordinances for the work, which were adopted by the board of aldermen of said city of Westport (page 4),

(3) And the order for the work aforesaid upon each of the streets aforesaid was in each case not due to any necessity therefor, (page 4),

(4) or because the said board of aldermen deemed the same, or any of them necessary to be done (page 4),

(5) but because of the lobbying and conduct aforesaid of the agents and servants of the defendant owners (page 4),

(6) and because of their lobbying with the board of aldermen of the city of Westport, (page 4),

(7) and the defendant's undue and illegal influence over the board of aldermen of said city of Westport (page 4),

"*Seventh*—(This charge of the bill is omitted for the reason that no errors are assigned to the decision of the court thereon.)

"*Eighth*—(This charge of the bill, including any amendments thereto, is omitted for the reason that no errors are assigned to the decision of the court thereon.)

"*Ninth*—That the defendant had exclusive control of the importation, sale and use of the genuine Trinidad Lake Asphalt in and to the said city of Westport at the times of the specification of the same by the city of Westport for the three street pavements here in question. (Page 5).

"*Tenth*—That with a view to lessen, and which tended to lessen, full and free competition in the importation, manufacture and sale of other good and useful brands of asphalt for street paving, the board of aldermen of said city of Westport, at the instigation of the defendant, and by arrangement and agreement and combination with the defendant, specified and required in the resolutions, ordinances and contracts with the defendant, that each of the street pavements here in question should "consist of a genuine Trinidad Lake Asphalt pavement" (Page 5).

"*Amendment to Tenth charge of the Bill.* (1) That the defendant, the city engineer, the board of aldermen and mayor of said city of Westport conspiring, combining and contracting in restraint of trade and commerce among the several states and with foreign nations, and in restraint of trade and commerce between the Indian Territory of the United States and the state of Missouri, caused to be specified in the resolutions and ordinances of said city, and contracts for the paving in question, that it should consist of a genuine Trinidad Lake Asphalt, thereby meaning and intending the asphalt produced and existing in Trinidad Lake, of the Island of Trinidad, without the United States, and within the domain of another nation, and

(2) The defendant, at and before the dates alleged in this bill, monopolized and attempted to monopolize, combined and conspired with said city authorities and other persons unknown to complainant, to monopolize the trade and commerce among the several states as to the importation,

sale and use of Trinidad Lake Asphalt, whereby it had, and attempted to have at the times here in question, the exclusive control of the importation, the sale and use of said asphalt in and to the city of Westport and Kansas City, Missouri, so that when the defendant induced and persuaded the city authorities of said city of Westport to specify genuine Trinidad Lake Asphalt in its resolutions, ordinances and contracts for the pavements in question, it had monopolized, and attempted to monopolize, a part of the trade and commerce of the several states and with foreign nations, all in violation of the Act of Congress contained in the Act of July 2, 1890, 'to protect trade and commerce against unlawful restraints and monopolies,' and

(3) the said resolutions and ordinances of said city of Westport also violate the commerce clause of Section 8 of Article I of the Constitution of the United States (page 22).

"*Eleventh* (This charge of the bill is omitted for the reason that no evidence was offered thereon).

"*Twelfth.* That the reason this action has not heen brought before is that to within two days of the present time since and before the issue of the tax-bills in question the complainant and agents of the defendant have had pending, propositions to a compromise and settlement of the same to avoid litigation" (page 6).

Prayer. The prayer of the bill is that the defendant be required to answer the premises, and that the court grant complainant a perpetual injunction restraining defendant, his agents and servants, from transferring the said tax-bills, or any of them, to any other person; also from bringing any other action in any other court; also from prosecuting any action that may hereafter be brought in any other court; and that the defendant be required to bring the said tax-bills into court and cancel and remove the same as claims or clouds against the real estate aforesaid of complainant, and for such other and further relief in the premises as the nature of the case will require and to the court may seem meet, and for all costs of this suit. (Then follows a prayer for writ of subpœna, etc., pages 6 and 7).

Defendant's Answer. The defendant's admissions and denials of allegations of the bill will be stated and cited in the "Brief of the Argument" *post.*

The new matter in Defendant's Answer. The defendant's answer alleged the following:

"This defendant states that the streets improved as aforesaid are streets running north and south in front of the lots hereinbefore described and extend therefrom directly and through the center and business portion of Kansas City, Missouri, which is a great and growing city which has more than two hundred thousand (200,000) inhabitants, and that the lots hereinbefore mentioned and described are in one of the most fashionable and rapidly developing residence localities of the said city; that all the lots and lands fronting on that portion of each of the streets improved as aforesaid, are similarly situated with reference to the street so improved with other lots fronting thereon and are of equal value with the other lots fronting on said streets within the distance improved as aforesaid, were enhanced and increased in value by reason of the pavement of said street with asphalt directly in proportion to the frontage of each lot or tract of land upon such improvement and to an extent greater than the amount charged against such lot or tract of land to pay for such pavement and as evidenced by the special tax-bills hereinbefore referred to.

This defendant admits that the complainant, R. H. Field, was not, at the time the contracts were made for and the work of paving the streets done as aforesaid, a resident of the city of Westport, but states that the said Field at all such times was a resident of Kansas City, Missouri, and knew that the said contracts were being let and that the said work was being done, and that he did not at any time object to, protest or remonstrate against the doing of said work until after the completion thereof by the defendant herein and its acceptance by the said city of Westport, and that he, the said Field, at all times consented to the paving of said streets by this defendant and the improvement of his property thereby, and has at all times heretofore and now has benefit of the said improvements." (page 10.)

General Replication. The complainant filed general replication denying in due form the allegations of the answer. (page 14).

Decree and Judgment. On October 10th, 1902, the court entered its finding, judgment and decree in this case, as follows:

For the Complainant. (1) That Westport, at the times in question, was a Missouri city of the fourth class, having the powers of a city of that class as conferred by the laws of Missouri and none other.

(2) That Westport ceased to exist, and became a part of Kansas City, Missouri, December 2nd, 1897.

(3) That the defendant held all of the special tax-bills alleged in complainant's bill against complainant's lands as alleged in complainant's bill.

(4) And the court by its judgment and decree held and adjudged void the special tax-bills held by the defendant for the Wyandotte street pavement against the complainant's property, and granted complainant all of the relief prayed for in his bill as to the said Wyandotte street special tax-bills.

For the Defendant. The finding, judgment and decree of the court was for the defendant, the Barber Asphalt Paving Co., on the issues in the case as to the validity of the alleged special tax-bills for the Main street and Baltimore avenue paving in question; the court adjudged and decreed the said special tax-bills valid and binding charges of defendant against complainat and his property; the court also adjudged and decreed that complainant have and recover no relief as to the Main street and Baltimore avenue special tax-bills, aforesaid, and that complainant's bill, filed herein be dismissed, as to the said Main street and Baltimore avenue special tax-bills (pages 23-24).

The costs of the case taxed and adjudged against complainant and defendant equally.

Appeals. At the ensuing term of the court, towit, at the November term, on the 18th day of December, 1902, complainant and defendant, respectively asked and each were allowed an appeal to the Supreme Court of the United States (Id. page 35).

Questions Raised and Involved in Complainant's Appeal. The questions raised and involved in complainant's appeal are as to the validity of the special tax-bills, for the Main street and Baltimore avenue pavements aforesaid, which were adjudged valid and binding charges upon complainant and his property. The grounds of illegality of the special tax-bills in question, as alleged in complainant's bill, and his assignment of errors filed to and upon the judgment appealed from are the following:

1. That the provisions of the Missouri State Legislative Act (Laws of 1895, sections 88 to 95, Inc., pages 85 and 86) under which the tax-bills in question are claimed by the defendant as liens upon the complainant's real estate, deprive the complainant of his said real estate without due process of law, and deny the complainant, a resident of Kansas City, Mo., the equal protection of the laws afforded to resident owners of property in said city of Westport, and take his property for the private use of said residents of Westport, and violate section 1 of the 14th amendment to the Constitution of the United States.

2. That the resolutions adopted by the board of aldermen of Westport declaring the street pavements in question necessary, were unauthorized and are void because each of said resolutions also declared and specified that the pavement should consist of a "genuine Trinidad Lake Asphalt pavement."

3. That the "Trinidad Lake Asphalt" specification in the resolutions and ordinances for the pavements makes a monoply in an article of interstate and foreign commerce and cannot be saved from illegality and nullity under cloak of a municipal liberty of judgment and action upon the subject.

4. That the ~~city~~ resolutions and ordinances ordering the asphalt pavements in question specified and required "Trinidad Lake Asphalt" as the asphalt to be used in such pavement, and excluded from the market for use, and from being contracted for, and from being used in said pavements, the asphalt of other foreign countries and of the United States, and violated the commerce clause of section 8 of article 1 of the Constitution of the United States.

5. That the resolutions, ordinances and contracts for the street pavements in question, respectively, violated the act of Congress of July 2, 1890, entitled "To protect trade and commerce against unlawful restraint and monopolies."

6. That the contracts for each of the street pavements in question were in restraint of trade and commerce among the several states and with foreign nations, and in restraint of trade and commerce between the Indian Territory of the United States and the State of Missouri in specifying that the pavement in question should "consist of a genuine Trinidad Lake Asphalt," and violated the anti-trust act of Congress, aforesaid.

7. The specification in the resolutions, ordinances and contracts for the pavements in question that they should "consist of a genuine Trinidad Lake Asphalt" was due to a conspiracy or combination between defendant and the Westport city authorities in violation of the anti-trust act of Congress, aforesaid.

8.—That the defendant, at and before the dates alleged in the bill, filed in this case, monopolized, or attempted to monopolize the paving of streets with "Trinidad Lake Asphalt" in Kansas City and Westport, Mo., and had

and attempted to have, at all the times here in question, the exclusive control of the importation, sale and use of "Trinidad Lake Asphalt" in the city of Westport, Mo., in violation of the anti-trust act of Congress aforesaid.

9. That defendant had a monopoly of the importation, sale and use of "Trinidad Lake Asphalt" in and to the city of Westport, Mo., at the times in question.

10. That with a view to lessen, and which tended to lessen, full and free competition in the importation, sale and use of other good and useful brands of asphalt for street paving the board of aldermen of the city of Westport, at the instigation of the defendant and by arrangement, agreement and combination with the defendant specified and required in the resolutions, ordinances and contracts, that each of the street pavements here in question should "consist of a genuine Trinidad Lake Asphalt" pavement.

11. The resolutions and ordinances in question, and each of them, are void for the following additional facts not appearing on the face thereof, to-wit: the resolutions and ordinances of the board of aldermen of Westport for the pavements in question were not adopted, and the work was not ordered by the board of aldermen of Westport, because said board deemed the said pavements, or either of them, necessary, but because of the lobbying of the defendent with the board of aldermen of Westport for said work, and because of the defendant's undue and illegal influence over said board of aldermen.

12. That the special tax bills against lots 1 to 5, inclusive, in block 45, for the Main street paving are void, because the city authorities of Westport were not authorized in 1897 to include in the Main street pavement in question the south block thereof, to-wit: the block extending from 39th Street to Westport Ave. and assess any part of the cost thereof against the abutting lands on this part of Main street when there was then a good and substantial macadam pave-

ment thereon in no need of repairing or replacement by another pavement for the public use or for safe and convenient travel thereon.

Specification of errors Relied Upon by Complainant.

1. The judgment and decree in this is erroneous as follows: The court erred in adjudging and decreeing valid and binding on complainant and his property the special tax-bills issued to defendant for the paving of Main street, in question.

2. The court erred in adjudging and decreeing valid and binding on complainant and his property the special tax-bills issued to defendant for the paving of Baltimore Avenue, in question.

3. The court erred in ordering and decreeing that complainant have and recover no relief as to the Main street special tax-bills described in his bill filed in this cause.

4. The court erred in ordering and decreeing that complainant have and recover no relief as to the Baltimore Ave. special tax-bills described in his bill filed in this cause.

5. The court erred in ordering and decreeing that complainant's bill be dismissed as to the Main street special tax-bills, in question in this cause.

6. The court erred in ordering and decreeing that complainant's bill be dismissed as to the Baltimore Avenue special tax-bills described in his bill filed in this cause.

7. The court erred in not adjudging and decreeing void, and in not canceling the special tax-bills in question for the Main street pavement.

8. The court erred in not adjudging and declaring void the special tax bills in question for the Baltimore Avenue pavement.

(See complainant's assignment of errors. Page 25.)

Questions Involved in Defendant's Appeal.

The defendant's appeal is from the portion of the judgment and decree adjudging void, etc., the special tax-bills, etc., for the Wyandotte street pavement. The assignment of errors filed by the defendant, in substance, assigns two errors of the court in this part of the judgment and decree in question, as follows:

First—(No. "I", "first" to "eighth", inclusive)—That the court erred in holding the Wyandotte street pavement was unnecessary, and that the proceedings therefor, to-wit, the resolution, ordinance and contract of the board of aldermen of Westport for the repavement of Wyandotte street with asphalt, and the tax-bills therefor, were unauthorized and void.

Second—(No. "II")—"The defendant says that the decree heretofore rendered and entered in said cause, in so far as it adjudges and decrees that the said Circuit Court had jurisdiction over this suit, and that the amount in dispute is not less than Two Thousand Dollars, is erroneous and against the just rights of the defendant." (Printed Record, Pages 32-34).

Motion to Dismiss Defendant's Appeal

There is now pending a motion, filed by complainant, to dismiss the defendant's appeal. After due notice to the defendant this motion was submitted to the court on Monday, October 26, 1903. On the following Monday, November 2, 1903, the court announced its order, that this motion would be disposed of with the case on its merits.

BRIEF OF THE ARGUMENT.

Complainant's Bill

The court will avoid any confused view of the alleged illegalities of the special tax-bills here involved, by avoiding all allegations of the bill of other illegalities on which no errors have been assigned by either appellant. Such effete parts of the bill are omitted and indicated as omitted, and the other parts of the bill, which are alive in this court, are printed as the "allegations of complainant's bill" in the "concise statement" (*ante* page 2 *). Each allegation of the bill is here put in a distinct paragraph, which is followed by a citation to the page of the printed record at which such paragraph may be verified.

Topical Statement of the Proofs, etc.

The following is submitted as a statement of all the proofs and other matters in the case, relevant to any question in either appeal. Where testimony is undisputed or documentary, this statement in large part recites such testimony as facts; but wherever there is or can be any difference of view, as to the meaning of any document or testimony on any issue in the case, such document is set out *haec verba*, and all such testimony of any witness is fully abstracted.

SECTION A.

Diverse Residence and Citizenship.

"First" charge of bill (*ante* page 2). This allegation is admitted in defendant's answer (pages 7 and 8 *).

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* NOTE—*The figures in parenthesis, after paragraphs hereinafter set forth, are pages of the printed record prepared and filed in this case by the clerk of this court. The other references "ante" and "post" are to the "concise statement" ante, and to this "topical statement of the proofs," etc.*

SECTION B.

Amount Involved.

"Third" charge of the bill (*ante* page 2). The allegations of the bill are: That defendant is the owner and holder of special tax-bills aggregating $3,376.45, exclusive of interest and costs, purporting to have been issued against the real estate aforesaid by the late city of Westport for paving done by defendant in the city of Westport on Main St., Baltimore Ave., and Wyandotte St., respectively.

"Fifth" charge of the bill (*ante* page 3). That the special tax-bills against the complainant's real estate for the respective pavements aforesaid, were as follows:

For the Baltimore Ave pavement:

Against lot	7,	Block	39,		$141.96
" "	8,	"	"		170.35
" "	8,	"	45,		132.95
" "	9,	"	"		132.90
" "	10,	"	"		132.92
" "	1,	"	49,		180.00
15 17-100 ft.	lot 2	bl'k	50,		43.07

Total assessment against above lots for Baltimore Ave. pavement $934.14

For the Wyandotte St. pavement:

Against lot	3,	Block	41,		$172.68
" "	4,	"	"		172.68
" "	1,	"	49,		58.08

Total assessed against above lots for Wyandotte St. pavement $703.44

For the Main St. pavement:

Against lot	1,	Block	39,		$266.13
" "	2,	"	"		221.77
" "	1,	"	50,	south 15 ft.	66.50
" "	1,	"	45,		232.23
" "	2,	"	"		232.23
" "	3,	"	"		232.23
" "	4,	"	"		232.23
" "	5,	"	"		232.23

Total assessed against above lots for Main St. pavement $1738.87

The answer admits that the defendant holds all of the above special tax-bills against the above described lots of land, except the one for the Wyandotte street pavement against *lot 1, block 49*, for $358.08 and alleges that these tax-bills are respectively valid and subsisting liens upon the several lots above described. (Pr. Rec. 8 and 9).

The ordinance levying the assessments for the Wyandotte street pavement shows a levy against lot 1 in block 49 above alleged (page 186), and the undisputed testimony of complainant was that since he filed this bill he had been sued in the State court on all of these tax-bills (page 199).

SECTION C.

Complainant's Title to lands.

"Second" charge of bill (*ante* page 2). Defendant's answer admits, that complainant owns and owned at the times in question lots 1, 2, 7 and 8 in block 39; lots 3 and 4 in block 41; lot 1 block 49; the south 15 17-100 ft. of lots 1 and 2, block 50, "Hyde Park" in the late city of Westport, now a part of Kansas City, Mo., but denies that complainant owns or owned at the times in question an undivided half of lots 1, 2, 3, 4, 5, 8, 9, and 10 in block 45, "Hyde Park" in the late city of Westport, now a part of Kansas City, Mo. (page 8).

Complainant offered evidence showing that he also owned, at all times in question, the undivided one-half of *the lots in block 45*, in issue. Such evidence was undisputed and unquestioned and is as follows:

(1). A deed from Sarah P. Anderson to Annie Camp Field, dated July 14th, 1886 (page 199).

(2) This deed, as appears from the undisputed testimony, was the result of a written contract of sale of the property dated June 21st, 1886, entered into by Mrs. Sarah P. Anderson (the grantor and then owner of the property), and R. H. Field (the complainant) as the purchaser (page 201).

(3) The purchase money of this property was $10,000. George H. Camp, father of complainant's wife, Annie Camp

Field, advanced and paid one-half, and complainant, R. H. Field, paid the other half of the price of this property. (Id.)

(4) The land described in this deed was afterwards, in 1897, platted as block 45, "Hyde Park," with lots numbered 1 to 10 (Id.).

(5) Since then only two of the lots were sold (Id.).

(6) On September 18th, 1895, (more than four years before this suit was filed), Annie Camp Field, on complainant's request, signed and delivered to complainant a written declaration of trust. This declaration of trust is in the record as offered in evidence by complainant, and recites that Annie Camp Field held the lots in block 45 in her name in trust for George H. Camp and R. H. Field, equally, and also recites that she held in her name in trust for George H. Camp title to lot No. 1, block No. 6, Coates Addition to Kansas City, not here in question (Id.). This declaration of trust, as shown by the undisputed testimony of the complainant, was, on the date aforesaid (September 18, 1895) forwarded to Mr. Camp, the co-beneficiary therein, and was held by him until loaned to complainant for use in the taking of testimony in this case (page 202). This testimony was taken March 24th, 1900 (page 194).

(7) Complainant had actual and exclusive possession of the lots in block 45, paid the yearly taxes thereon, and claimed them for himself and Mr. Camp since 1887 or 1888 (p. 202), more than ten years before January 4th, 1900, the day this suit was filed (page 1).

(8) Complainant also showed that after this suit was commenced, Annie Camp Field signed and delivered to him another declaration of trust wherein she acknowledges in due form of law that she holds in her name for him one-half of the title to the lots in said block 45. This declaration of trust was also read in evidence, and is in the record of this case (page 203).

The foregoing was all of the testimony offered on the issue as to complainant's title to the lots in block 45.

SECTION D.

The Issue as to Complainant's Title Abandoned.

There was no further testimony taken, and not a question was asked by defendant, on the issue tendered in the answer as to complainant's title and interest in the lots in block 45, but on other issues in the case, the defendant took over 300 pages of depositions, which are in the transcript filed in this case. (See printed index to testimony taken by defendant). In depositions taken and filed by defendant in this case will be found the following questions to the witnesses by Mr. Scarritt, solicitor for defendant.

E. R. CRUTCHER (page 257):

DIRECT EXAMINATION BY MR. SCARRITT.

"Q. Please state your name, place of residence and occupation? A. E. R. Crutcher, Kansas City, Missouri. Real estate and fire insurance (page 257).

Q. Are you familiar with the real property fronting on Main street from 31st street to Westport avenue and on Baltimore avenue and Wyandotte street between Hunter avenue and Westport avenue in this city? A. I am.

Q. Are you familiar *with the property of complainant in this suit, which is described in the tax-bills referred to in the bill of complaint*, fronting on these three streets? A. I am in a general way.

Q. Will you state whether or not in your opinion the lots of the complainant, Field, fronting on Main street, and abutting on the asphalt pavements, constructed as alleged in the bill of complaint in the fall of 1897 in front of his lots, were especially benefited and enhanced in value by reason of the construction of that pavement? A. I think it was" (page 258).

A. B. BEEDLE (page 271):

DIRECT EXAMINATION BY MR. SCARRITT.

"Q. Please state your name, place of residence and occupation? A. A. B. Beedle, 3608 Baltimore avenue,

Kansas City, Missouri. Business, real estate and insurance (page 271).

Q. *Are you familiar with the lots of the complainant Field, described in the bill of complaint in this suit,* some of which front on each of these streets? A. Why, I am familiar with all the ground in both blocks.

Q. Referring to lots one and two, block 39, and the south 15 feet of lot one, block 50, that joins the two last above described in Hyde Park, and *also lots one to five, block 45, also in Hyde Park* which front on Main street, you may state whether or not in your opinion these lots were especially benefited and enhanced in value by reason of the construction of the asphalt pavement under the contract referred to in the bill of complaint, and if so please state the extent of their special benefits? A. Why in my opinion they were benefited by the pavement (page 272).

Q. *Now it appears from the allegations of the bill that complainant owns lots eight, nine and ten, block 45, Hyde Park,* lots seven and eight, block 39, lot one, block 49, and the south 15.17 feet of lot 2, block 50, which abut on Baltimore avenue, please state whether or not in your opinion these lots were especially benefited and enhanced in value by reason of the construction of the asphalt pavement on Baltimore avenue under the contract referred to in the bill of complaint? A. Yes, sir. * * *" (page 273).

CHAS. E. FINLAY: Direct examination by Mr. Davis

"Q. Please state your name, residence and place of business? A. Chas. E. Finlay, etc. (page 287).

Q. State to what extent you have held property in the southern portion of this city? A. Well, I built some houses on Baltimore avenue and Main street and Wyandotte street (page 287).

Q. *Are you familiar with the lots owned by complainant Field in this case, described in the bill of complaint,* some of which front on each of the streets you have named? A. Yes, sir.

Q. You may state whether or not in your opinion *the lots of the complainant referred to* in the bill of complaint were especially benefited and increased in value by reason of the construction of the asphalt pavements on the streets in

front of them under the contract referred to in the bill of complaint? A. Yes, sir, I should think they were, etc.

Q. Does that answer ~~then~~ apply to his lots on each of the streets named? A. Yes, sir," etc. (page 288).

Section E.

Lands in the City of Westport.

The allegation in the "second" charge of complainant's bill that his lots of land aforesaid were, when the pavements hereinafter mentioned were contracted for and done, in the corporate limits of Westport, Missouri (page 1), is admitted in defendant's answer (page 8). (Westport was then an adjacent suburb immediately south of Kansas City, page 410).

The allegation in the "second" charge of complainant's bill that the city of Westport ceased to exist and the real estate aforesaid of complainant was included within the corporate limits of Kansas City, Missouri, on December 2, 1897, by virtue of the extension of the territorial limits of Kansas City made on that day (page 2) is also admitted in defendant's answer (page 8).

Section F.

Westport, a Missouri Fourth-Class City.

The allegation in "second" charge of complainant's bill that the city of Westport, at the times in question, was a Missouri city of the fourth-class (page 1), is admitted in defendant's answer page 8.

Charter Power of Westport.

(1) The mode of enacting a city ordinance by a Missouri city of the fourth-class, is prescribed by sections 62 and 63 of the state legislative act in question. Missouri Laws (session) 1895, page 77.

(2) The power of a city of the fourth class to enact ordinances to improve its streets, is conferred in section 85, of the same page 84.

(3) The whole power conferred upon such a city to pave a street, and to assess the cost thereof against the abutting lands, and how these things were to be done, is contained in sections 88 and 95, inclusive, of the said state legislative act. Id, pages 85 and 86. The last named sections are the provisions alleged to be violative of section 1 of the fourteenth amendment in "fourth" charge of complainant's bill (page 2).

The provisions of the Missouri legislative act of 1895, above referred to, read as follows:

"Section 62. The style of the ordinances of the city shall be: 'Be it ordained by the board of aldermen of the city————as follows:' No ordinance shall be passed except by bill, and no bill shall become an ordinance unless on its final passage a majority of the members elected to the board of aldermen shall vote for it, and the ayes and nays be entered on the journal; and all bills shall be read three times before their passage. No ordinance shall be revived or re-enacted by mere reference to the title thereof, but the same shall be set forth at length, as if it were an original ordinance. No bill shall become an ordinance until it shall have been signed by the mayor or the person exercising the duties of the mayor's office, or shall have been passed over the mayor's vote, as hereinafter provided."

"Section 63. Every bill duly passed by the board of aldermen and presented to the mayor and by him approved shall become an ordinance, and every bill presented as aforesaid, but returned with the mayor's objections thereto, shall stand reconsidered. The board of aldermen shall cause the objections of the mayor to be entered at large upon the journal, and proceed at its convenience to consider the question pending, which shall be in this form: 'Shall the bill pass, the objections of the mayor notwithstanding?' The vote on this question shall be taken by ayes and nays and the names entered upon the journal, and if two-thirds of all the members elect shall vote in the affirmative, the city clerk shall certify the fact on the roll, and the bill thus certified shall be deposited with the proper officer, and shall become an ordinance in the same manner and with like effect as if it had received the approval of the mayor. The mayor shall have power to sign or veto any ordinance passed by the

board of aldermen: 'Provided, that should he neglect or refuse to sign any ordinance and return the same with his objections, in writing, at the next regular meeting of the board of aldermen, the same shall become a law without his signature."

(Missouri Legislative Act of 1895, page 77).

"Sec. 85. The cities coming under the provisions of this act, in their corporate capacities (are authorized) and empowered *to enact ordinances* for the following purposes in addition to the other powers granted by law:

First. To levy and collect taxes for general revenue purposes on all mixed, personal, and real property within the limits of said city, taxable according to the laws of the state.

Second. *To open and improve streets*, alleys, avenues, and other highways, and to make sidewalks and build bridges, culverts, drains and sewers within the city, and to establish grades for all improvements herein mentioned. Cities of the fourth class shall have and exercise exclusive control over all streets, alleys, avenues and public highways within the limits of such city. (Laws of Missouri, Session 1895, page 84).

Sec. 86. The cost of bringing to grade all streets, avenues, alleys and other highways, and for the building of bridges, culverts, public sewers and foot-walks across streets, avenues, alleys and other public highways shall be paid out of the general revenue fund of the city.

Sec. 87. For making and repairing sidewalks and sidewalk curbing, the costs thereof shall be levied as a special assessment on all lots and pieces of ground abutting on such improvements, in proportion to the front feet thereof; Provided, that corner lots shall be liable for the extension of curbs and sidewalks to the curb line each way.

Sec. 88. *The cost of paving*, macadamizing, guttering and curbing (where such curb is set out into the street beyond the sidewalk) all streets, avenues, alleys and other highways, or any part thereof or any connection therewith, and repairing the same, and for all excavating and grading necessary for the same (after said streets, avenues, alleys and other highways, or parts thereof or connections therewith, have been first brought to grade, as hereinbefore provided),

shall be levied as a special assessment upon all *lots and pieces of ground upon either side of such street*, avenue, alley, or other highway, or part thereof or connection therewith, *abutting theron*, along the distance improved, in proportion to the front foot.

Sec. 89. The cost of paving or macadamizing the squares and areas as formed by the crossing or meeting of streets and other highways, or parts thereof or connections therewith, shall be levied upon as a special assessment and paid for as follows: Such area shall be divided into parts or portions by lines drawn lengthwise along the middle of eaeh of said streets or highways so intersecting or meeting, and the cost of said parts or portions shall be levied as a special assessment against the block or square contiguous to each, and prorated against the lots or pieces of ground in such block or square abutting on the street improved.

Sec. 90. *The assessments* made for making and repairing sidewalks and sidewalk curbing, *and for paving*, macadamizing, curbing and guttering all streets, avenues, alleys and other highways, and repairing the same, as herein provided, shall be known as special assessments for improvements, and *shall be levied and collected as a special tax, and a special tax-bill shall issue therefor*, and shall be paid in the same manner provided by ordinance. Said special tax-bills may bear interest after thirty days from date of issue at the rate of eight per cent per annum, *and every such (such) tax-bill shall be a lien* against the lot or piece of ground described in the same until the same is paid.

Sec. 91. Before the board of aldermen shall make any contract for building bridges, sidewalks, culverts or sewers, or for paving, macadamizing, curbing, guttering or grading any street, avenue, alley or other highway, an estimate of the cost thereof shall be made by the city engineer or other proper officer and submitted to the board of aldermen, and no contract shall be entered into for any such work or improvement for a price exceeding such estimate; Provided, that no such estimate shall be required for the makings of any local or special repairs.

Sec. 92. All special tax-bills issued for special assessments for paving, macadamizing, curbing, guttering, excavating, grading, construction of sidewalks, and for district sewers, and for any other purpose whatever authorized

by this act, shall be assignable and collectible in any action brought in the name of the city to the use of the holder thereof; but the city shall not in any event be liable for any cost that may accrue in such action. *Such special tax-bills shall, in any action thereon, be prima facie evidence* of the regularity of the proceedings for such special assessments, of the validity of the bill, of the doing of the work and of the furnishing of the materials charged for and of the liability of the property to the charge, stated in the bill.

Sec. 93. The total cost of paving, macadamizing, curbing, guttering and the necessary excavation and grading for the same, of any street, avenue, alley or square, or other highway or part thereof, may be paid in three annual payments—one-third in one year, one-third in two years and one-third in three years from the date of the issue of the special tax-bills—each payment to bear not to exceed eight per cent interest per annum from date of issue to date of payment; Provided, that the owner of any lot or parcel of ground fronting on such street, avenue, alley or other highway, or square or part thereof improved, shall, within thirty days after the letting of the contract (for such) work, notify the city clerk, in writing, that he desires to pay the same in three annual payments. In such cases the city clerk, engineer or other proper officer shall make out three special tax-bills, which shall be signed by the mayor and attested by the city clerk, each for one-third part of the cost of such work, bearing interest as aforesaid, which rate shall be fixed by ordinance, and deliver the same to the contractor for the work. Each and every tax-bill shall be a lien on the lot or parcel of ground therein described, and such lien shall continue for one year for the maturity of the tax-bills last becoming due, until paid, or until the final determination of any legal proceedings to collect same; but no such suit shall be brought on any such tax-bill until after the maturity of all such tax-bills.

Sec. 94. The board of aldermen may, by ordinance, include in the special assessment the cost of bringing to the established grade any street, avenue, alley or other highway or square or area formed by the intersection or meeting of streets or other highways or part thereof proposed to be improved as herein provided, when in its judgment or opinion the general revenue fund of the city is not in a condition to warrant an expenditure therefrom for bringing the

same to an established grade; Provided, that the resolution declaring such work necessary to be done, and published in some newspaper published in the city, shall in addition to other work of improvement therein provided for, include and describe the work of bringing such street, avenue, alley or other highway or square or part thereof to the established grade. In all cases where such work is authorized by virtue of such resolution, and contracted for in pursuance thereof, the bringing to grade as above described shall be included in the same contract with the other work provided for therein, and tax-bills shall be issued in payment or all said work as may be provided for by ordinance.

Sec. 95. *When the board of aldermen shall deem it necessary to pave*, macadamize, gutter, curb (when such curbing is set out into the street beyond the sidewalk) or otherwise improve any street, avenue, alley or other highway, or any part thereof, within the limits of the city, *for which a special tax is to be levied as herein provided, the board of aldermen shall, by resolution declare such work or improvement necessary to be done, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks*; and *if a majority of the resident owners* of the property liable to taxation therefor *shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such improvements, then the board of aldermen shall have power to cause such improvements to be made, and to contract therefor, and to levy the tax as herein provided;* and the finding of the board that a majority of such owners have not filed protest shall be conclusive and final." (The succeeding provisions have and make no reference to street paving or to assessments therefor.) Session Laws of Missouri, 1895, Pages 85–86.

All street paving paid for in special tax bills.

All of the street paving done in Westport was paid in special tax bills levied on lands abutting on the street paved, according to the frontage of such lands. (Page 81 of the printed record.)

SECTION G.

Lands Vacant and Unimproved. The allegation in the "Fourth" charge of complainant's bill, that all of the complainant's real estate, charged with the tax bills in question, is vacant and unimproved, and that the greater part of the other lands fronting on the three street pavements aforesaid was vacant and unimproved at the times in question (Page 2), is sustained by uncontradicted testimony. (Pages 85, 93, 142, 189, 195, 196-197, 207.)

SECTION H.

Complainant's Residence. The allegation in the "Fourth" charge of complainant's bill that complainant was not at any time therein named a resident of said city of Westport, but was at all the times therein named a resident of Kansas City, Missouri, (pages 194-195 also page 10) and the owner of the real estate hereinbefore described is sustained by uncontradicted testimony. See "Section C" *ante* page. 17.

SECTION I.

Denial of Equal Protection. In support of the allegation in "Fourth" charge of the bill (page 2) that complainant was deprived of his property without due process of law, and denied equal protection of the laws offered to resident owners of property in the city of Westport, etc., the testimony of witnesses on this subject was, that the charter provision of Westport allowing resident owners of lands adjacent to a street to protest against and prevent street improvements proposed to be assessed against adjacent lands was construed by the Westport authorities to allow all such residents such right of protest, whether they resided on the street proposed to be improved, or elsewhere in the city, and the practice was to exclude non-resident owners of such lands as having no right to participate in any protest to the Westport authorities against a proposed improvement.

George L. Love, City Clerk (Pages 73–168).

Charles T. Getty, (Page 400).

There is no issue in the testimony on this subject.

Section J.

Specification of Trinidad Lake Asphalt, etc., For The Pavements.

The preliminary resolution adopted by the board of aldermen, declaring that the Board of Aldermen deemed the *Main street* pavement necessary, was as follows:

No. 540.

The Resolutions.

"A resolution declaring the work of paving Main street from the center line of Thirty-first street or Springfield avenue to the south line of Westport avenue to be necessary.

Be it Resolved by the Board of Aldermen of the City of Westport, that it is necessary to pave Main street from the center line of Thirty-first street or Springfield avenue to the south line of Westport avenue in the city of Westport, to the full width thereof exclusive of sidewalks of legally established width, and the spaces between the outside rails of the street railroad on said avenue, the pavement to consist as follows, to-wit: *a genuine Trinidad Lake asphalt* pavement: the base to consist of broken stone laid on the present macadam of such thickness as to bring said base up to within three inches of the finished surface of the pavement, upon this shall be poured one gallon of asphaltic cement to each square yard of broken stone, upon this base shall be laid a binder course of bituminous concrete one and one-half (1½) inches in thickness, upon this shall be laid a wearing surface one and one-half (1½) inches in thickness, the matrix of which shall be composed of *genuine Trinidad Lake asphalt*; *the whole work to be done in conformity with the plans and specifications therefor on file in the office of the City Engineer*, the total cost of the pavement not to exceed the sum of two ($2) dollars per square yard; the pavement to be guaranteed to endure without the need of any repairs for a period of five years. And the Board of Aldermen hereby declare such work necessary to be done. Adopted March 29, 1897.

G. L. Love, City Clerk." (Page 121.)

The city ordinance ordering and specifying the work for the *Main street* pavement was as follows:

No. 1803.

The Ordinances. "An ordinance to pave Main street from the center line of Thirty-first street, or Springfield avenue, to the south line of Westport avenue.

BE IT ORDAINED by the Board of Aldermen of the city of Westport as follows:

SECTION I. That Main street from the center line of Thirty-first street, or Springfield avenue to the south line of Westport avenue, in the city of Westport, be paved to the full width thereof, exclusive of sidewalks of legally established width and the spaces between the outside rails of the street railroad on said street.

SECTION II. The work shall consist of the materials and be laid in the manner following, viz: The pavement shall consist as follows, to-wit, *a genuine Trinidad Lake Asphalt pavement*, the base to consist of broken stone laid on the present macadam of such thickness as to bring the said base up to within three inches of the finished surface of the pavement; upon this shall be poured one gallon of asphaltic cement to each square yard of broken stone; upon this base shall be laid a binder course of bituminous concrete one and one-half (1½) inches in thickness; upon this shall be laid a wearing surface one and one-half (1½) inches in thickness, the matrix of which shall be composed of *genuine Trinidad Lake Asphalt, the whole work to be done in conformity with the plans and specifications therefor on file in the office of the City Engineer.* The total cost of the pavement shall not exceed the sum of two dollars per square yard, the pavement to be constructed of such material and in such manner that it shall endure without the need of any repairs for a period of five years after the completion thereof." Approved May 5th, 1897, (page 123).

The resolution and ordinance for the *Wyandotte street pavement* are in all respects the same as the resolution and ordinance for the Main street pavement, above quoted, except there is no reference therein to street railway tracks. (Page 171.)

The resolution, ordinance and contract provisions for the *Baltimore avenue pavement* is also the same as the resolution, ordinance and contract for the Main street pavement,

except as follows: Baltimore avenue was then only a dir street (Page 72). The foundation to the pavement thereo was required to consist of a layer of hydraulic cement con crete, 4 in. in thickness, while on Main street and Wyan dotte street the existing macadam thereon was to be used a the base of this asphalt pavement; on Baltimore avenue th binder course was 1¼ in. in thickness and the wearing sur face 1¼ in. in thickness, while on Main street and Wyan dotte street the requirement was that the binder course should be 1½ in. in thickness, and the wearing surface 1½ in in thickness. (Pages 147-154).

Refined Trinidad Lake Asphalt Required.

In each of the resolutions and ordi nances aforesaid is the following provision: "The whole work to be done in con formity with the plans and specifications therefor on file in the office of the city engineer."

(See this provision in the resolution for the Main street pavement, *supra*). (See this provision in the ordinance ordering the Main street pavement, *supra*). (See this provision in the resolution for the Baltimore avenue pavement, page 147). (See this provision in the ordinance ordering the Baltimore avenue pavement, page 148). (See this provision in the resolution for the Wyandotte street pavement, page 171). (See this provision in the ordinance ordering the Wyandotte street pavement, page 172).

The specifications of the work, referred to in this provision of the resolutions and ordinances for the pavements in question as on file in the office of the city engineer, were the same specifications as those next set out, as in the contracts made for the work. (pages 69-70).

The Contracts.

The following are such specifications and the contract provisions, as to the use of Trinidad Lake Asphalt in the Main street and Wyandotte street pavements in question: (pages 128–177).

"Binder Course.

Upon the base as above prepared there shall be spread a binder course of *bituminous concrete* composed of clean broken stone not exceeding one and one-half (1½) inches in their greatest dimension, and an asphaltic cement made *as hereinafter specified*, the parts to be thoroughly heated and then mixed by machinery in the proportion of not less than fifteen (15) gallons of asphaltic cement to one (1) cubic yard of broken stone.

The mixture shall be spread upon the base with hot irons and rakes, and while in a hot and plastic condition, shall be rammed and rolled until it forms a compact and thoroughly bonded binder course of a thickness of not less than one and one-half (1½) inches with an even and uniform surface parallel with and one and one-half (1½) inches below the completed surface of the pavement."

Wearing Surface.

"Upon the foundation thus prepared there shall be placed an asphalt wearing surface not less than one and one-half inches in thickness when thoroughly compressed, which shall be manufactured and laid as follows:

The wearing surface shall be composed of

1st. *Refined* Trinidad Lake Asphaltum.
2nd. Heavy Petroleum Oil.
3rd. Clean, fine sand.
4th. Pulverized Carbonate of Lime.

An asphaltic cement shall be prepared by melting and mixing acceptable quantities of *refined* asphaltum and heavy petroleum oil in the proportions of weight, of one hundred (100) parts pure asphalt to fifteen (15) to twenty (20) parts heavy petroleum oil.

The asphalt wearing surface shall be formed by mixing the materials as above specified in the following proportions:

Asphaltic cement from twelve (12) to fifteen (15) per cent.

Sand from eighty-three (83) to seventy (70) percent.

Pulverized carbonate of lime from five (5) to (15) per cent.

The mixture shall be effected as follows: The asphaltic cement and sand shall be heated separately to about three hundred (300) degrees Fahrenheit. The pulverized car-

bonate of lime, while cold, shall be mixed with the hot sand in the required proportions and to this mixture sufficient asphaltic cement, at the required temperature, shall be added to effect a thoroughly homogenous mixture.

The pavement mixture thus prepared shall be delivered upon the street at a temperature of not less than two hundred and fifty (250) degrees Fahrenheit. It shall then be quickly spread by means of hot iron rakes, in such manner as to insure an even and uniform surface, and to such depth that after having received its ultimate compression, it shall have a thickness of not less than one and one-half (1½) inches.

The pavement shall be ironed and rolled by hand, after which a small amount of hydraulic cement shall be swept over it, and it will then be thoroughly compressed with a steam roller, the rolling to continue as long as it makes an impression on the surface." (Pages 128–177).

The paving composition of Trinidad Lake Asphalt, Sand, etc., for the "Binder course" and the "Wearing surface" of the Baltimore avenue pavement was the same as aforesaid for the Main street and Wyandotte street pavements, but the binder course and wearing surface thereon was to be one and one-fourth (1¼) inches each. (Page 154).

Abundance and Equality of Other Asphalt.

In the "Tenth" charge of the bill it is alleged that there are other good and useful brands of asphalt besides the Trinidad Lake Asphalt (page 5) and in the amendment filed to this charge of complainant's bill it is alleged that the specification of Trinidad Lake asphalt, in the resolutions, ordinances and contracts for the street pavements in question, as the only asphalt authorized to be used in such pavements, is in restraint of interstate and foreign commerce. (page 22).

James B. McGowan, sub agent of the defendant, called as a witness by complainant, testified to the abnndance of asphalt in other tropical countries, and in California and Utah of the United States, and also that these other asphalts

had been used in all the cities of the United States, according to his understanding, and that all refined asphalt was supposed to be the same (Pages 423-424).

Henry A. Wise, called as a witness by complainant, testified: That he was a civil engineer, and had been a civil engineer for 32 years. That he was city engineer of Kansas City, Mo., from the spring of 1896 to the spring of 1900 (Page 461). That Trinidad asphalt and Trinidad Lake Asphalt comes from the Island of Trinidad, a British possession, off the coast of Venezuela. That the Trinidad Lake Asphalt has to be refined to be used in street pavements. These refineries of asphalt are mostly around New York City. As a rule, asphalts are refined wherever they come from; all crude asphalt, unless its purity is such that it does not need refining. Some of the California asphalts are so pure that they do not need refining, but as a rule the asphalts are refined; the organic and inorganic matter is taken out by the purifying process; this is the case with all artificial asphalts that are laid; there is rock asphalt that it does not apply to. Asphalt abounds in deposits in tropical and semi-tropical countries like Venezuela, Cuba, Peru, Mexico and Southern California, and in the rock formations in France, Sicily, Kentucky, Indian Territory, Utah, and various other places probably. Trinidad Lake Asphalt is in the form of a pitch asphalt, and so also is the asphalt in Venezuela, Cuba, Peru, Mexico and Southern California. The Bermudez asphalt, in its crude state, is more pure than the Trinidad Lake Asphalt, and some of the California asphalts are very pure. They are so pure that they have scarcely any organic or inorganic matter in solution, and therefore need less refining in order to get them in shape or condition to pave streets with. After these various asphalts are refined, by that process, they are brought into a state of purity. There is no substantial difference after going through the process of refining; they are practically all alike then (Pages 463-4). Mr. Wise further said it was a part of his duties as city engineer of Kansas City, Mo., to furnish speci-

fications to the board of public works for asphalt pavement in Kansas City, Mo., and that the specifications that were made up for the board of public works while he was in office, were made in his office. That he had visited other cities where they use the other mentioned asphalts in street pavements. There is no substantial difference in their specifications for street pavements with these other asphalts, in the specified composition with other material in the pavement. The asphalts, other than Trinidad Lake Asphalts, above named, have been used successfully from 5 to 8 years in New York City, Buffalo, Detroit, Cincinnati, Indianapolis, Minneapolis and Omaha; that he knew this from his own knowledge. That he was a railroad engineer and mechanical engineer before 1896, when he became city engineer of Kansas City, Mo., (Pages 464-5).

There was no other testimony on this issue.

Section K.

Defendant's attempted monopoly, and its monopoly of Trinidad Lake Asphalt pavement in Westport and Kansas City, Missouri.

Defendant laid 15 or 16 asphalt pavements in Westport, Missouri, under as many different contracts, the last, or among the last of which pavements, were the Main St., Baltimore Ave. and Wyandotte St. pavements here in question, were ordered or contracted for by Westport (Page 497). Nearly all the street pavements in Westport were laid in 1897 (Page 501), the year of the pavements in question.

"Trinidad Lake Asphalt" was specified in the Westport resolutions, ordinances and contracts as the asphalt required to be used in all of the 16 asphalt pavements ordered and contracted for by the City of Westport. (Pages 68-69 70-71, 498).

None of the resolutions or ordinances aforesaid (specifying "Trinidad Lake Asphalt") were written in the West-

port offices (Pages 503-515). They were generally brought out to Westport already prepared, by Jim McGowan, Getty or Norris, sub-agents of defendant (Pages 494-495). J. K. Griffith, one of the defendant's attorneys, called by complainant as a witness, admitted that he wrote the resolutions and ordinances for 2 of the 3 street pavements in question. (Page 45).

The defendant is the only contractor who laid an asphalt street pavement, or received a contract for an asphalt street pavement, in Westport, Missouri (Pages 97, 491-497).

The Parker-Washington Co. put in a lower bid than defendant's accepted bid for the first of the pavements here in question, to-wit: The Main St. pavement. Defendant's agents, Mr. Scarritt and Hugh J. McGowan, appeared before a committee of the board of aldermen of Westport and opposed the award of the contract to the Parker-Washington Co., the position taken by them being that the Parker-Washington Co. could not furnish "Trinidad Lake Asphalt," called for in the resolution and ordinance. And it was on this ground that the lower bid of the Parker-Washington Co. was rejected for the Main St. pavement, and the contract therefor was awarded to the defendant by the committee of the board of aldermen of Westport (pages 88-89-114).

The first specifications for asphalt street paving in Kansas City, Missouri, was simply "Asphalt on Concrete." Subsequently the specification was "Trinidad Lake Asphalt" (page 463).

The Barber Asphalt Paving Company never laid any street pavements in Kansas City or Westport except with Trinidad Lake Asphalt (pages 69-70-71, 405, 413).

The defendant has, since the year 1891, maintained an agency in Kansas City, Missouri, to importune and influence the city authorities of Kansas City and Westport to order and contract for asphalt street pavements with specification of "Trinidad Lake Asphalt" as the asphalt to be used in

such pavements. (See references pages 42 to 45 hereinafter).

Defendant has laid about 100 miles of asphalt street pavement in Kansas City, Missouri, (page 104) nearly all of the asphalt street paving in Kansas City (pages 463, 466, 99, 101.)

The defendant, Barber Asphalt Paving Company, laid all of the asphalt street paving in Kansas City previous to 1896, except possibly on one street (McGee street) (page 463). *In the fall of 1896 the* Parker-Washington Company bid for several asphalt paving contracts in Kansas City under the "Trinidad Lake Asphalt" specifications, one of which was Washington street, from 9th street to 13th street (4 blocks) and also Lawton Place (a half block) which is a small court between 13th and 14th streets east of Washington. This company was the lowest bidder, received the contracts and did the work of paving these two streets. Both of these pavements did not make over ¼ of a mile of pavement. This was all of the asphalt street paving done by the Parker-Washington Company in Kansas City, Missouri. They bid on a number of other streets for the asphalt pavement thereon having the "Trinidad Lake Asphalt" specification, and their bids were in each case lower than the Barber Asphalt Paving Company, but they did not receive the contracts therefor (page 466). The reason why these contracts were not given to the Parker-Washington Company was that the Parker-Washington Company was deemed an irresponsible company and could not furnish the "Trinidad Lake Asphalt" (page 467). This claim was made by the members of the public improvement committee, by aldermen in the common council, and by Hugh J. McGowan and the attorneys representing the Barber Asphalt Paving Company. The Parker-Washington Company paved a number of streets in Kansas City with brick. There was never any objection to their responsibility or failure to confirm their contracts, excepting when they bid on Trinidad Lake Asphalt pavements (page 468).

The Parker-Washington Company shipped a plant to Kansas City in 1896 for asphalt street paving—they still have it. They ceased bidding on asphalt street pavements in Kansas City, Missouri, at the close of 1897 (pages 468-469). After that they bid on brick pavements in Kansas City, Missouri and the asphalt pavements in Kansas City, Kansas, (page 469).

The Parker-Washington Company tendered a bond with their bids made in Kansas City, Missouri, for street paving with Trinidad Lake Asphalt, which bond was approved by the comptroller of Kansas City, Missouri, whose duty it was to approve such bonds (page 469).

In 1897 a committee appointed by the lower house of the common council of Kansas City, Missouri, investigated the ability of the Parker-Washington Company to furnish Trinidad Lake Asphalt. The representatives of the defendant, Hugh J. McGowan and W. C. Scarritt, were there, and participated in the examination (pages 470, 485). J. H. Harkless also (page 486). The claim there made by Mr. McGowan, and his attorneys, was that the Parker-Washington Company was not able to secure or procure Trinidad Lake Asphalt, and did not use it when they paved Washington street and Lawton Place (page 470). The committee of the common council reported that the Parker-Washington Company could not furnish Trinidad Lake Asphalt; and that Washington street and Lawton Place were not paved with Trinidad Lake Asphalt exclusively (page 470). McCormick, the president of the Parker-Washington Company, or one of its officers, was put on the witness stand and examined by the committee as to where he got his asphalt. The attorneys for the Barber Asphalt Paving Company did most of the questioning (page 485). Hugh J. McGowan was continually asserting the Parker-Washington people could not procure or produce Trinidad Lake Asphaltum, and he contended that such asphalt as they did have must be land asphalt and not lake asphalt (page 486). He repeat-

edly said they could not get Trinidad Lake Asphalt unless they got it from his company (page 487).

James H. Harkless, an attorney-at-law, of the firm of Harkless, O'Grady & Crysler in Kansas City, Missouri, filed three injunction suits in the circuit court of Jackson county, Missouri, at Kansas City, in the names of Joseph Lorie, Jennie Henrici and George Eberle, respectively, to prevent Kansas City from letting contracts to the Parker-Washington Company for paving 17th street, Park avenue and Tracy avenue under "Trinidad Lake Asphalt" specifications (pages 424-5). The petition in such suits each alleging among other things as ground for such injunction, the following:

"That the defendant, the Parker-Washington Company although it has bid upon said work under the specifications requiring the pavement to be laid with Trinidad Lake Asphaltum, it does not intend or purpose, and will not, if permitted to do the said work, lay the said pavement, or the matrix thereof, with Trinidad Lake Asphaltum; that the said defendant has no refined Trinidad Lake Asphaltum on hand, or has not a sufficient amount of that material with which to do the work aforesaid; that the said defendant, the paving company, has, by certain false affidavits and statements, misled and deceived the engineer of Kansas City, and the members of the common council of said city, and has, by reason of such false affidavits and statements, caused the city engineer and the members of the common council to believe that the said company has in its possession a sufficient amount of Trinidad Lake Asphaltum to execute the work aforesaid, and that it is the intention and purpose of that company so to do. Plaintiff states that the said engineer and members of the common council have not made any examination, *and have not the appliances in their possession with which to determine whether or not the asphaltum in the possession of the said defendant paving company, and with which it intends to pave the avenue aforesaid, is refined Trinidad Lake Asphaltum*" (pages 427-428).

The above quotation is from the petition in the George Eberle injunction suit aforesaid to prevent the work of pav-

ing Tracy Avenue being let to the Parker-Washington Company. It was stipulated that the petitions in the Henrici and Lorie cases (to prevent the paving on other streets being let to the Parker-Washington Co.) are the same as the petition in the George Eberle case, above quoted from, and that the said petitions shall be so considered as parts of this record without being copied herein (pages 453).

Mr. Harkless was called and examined as a witness by complainant and was repeatedly asked for whom he brought these suits, and who paid him his fee therefor. After declining, several times, to answer any of these questions, finally said he thought he brought these suits, and possibly one or two other like suits, because the Parker-Washington had attempted to get a contract for a pavement in front of a 33⅓ ft. lot that he owned on a different part of Tracy Av., under a different ordinance and different contract than that in the Eberle suit. He was not sure, but thought, he had filed a suit in his own name to prevent the pavement in front of his own lot. Could not say who paid the costs or furnished the bonds in these suits filed by him against the Parker-Washington Co (pages 425-434).

Wm. Henrici, husband of Jennie Henrici, called by complainant, testified: That the Jennie Henrici suit was allowed to be brought pursuant to a request of Mr. Griffith, of Scarritt, Griffith & Jones, the defendant's attorneys in this case; also that there was no communication whatever between Jennie Henrici, the plaintiff in the suit, or himself, and James H. Harkless, who acted as attorney in such suit (page 446).

A. M. Allen, deputy clerk of the Jackson county circuit court, called by complainant as a witness, produced the appearance docket showing the filing of these three suits, and Harkless, O'Grady & Crysler as attorneys of record for the plaintiff in each case (pages 455-459); also that the cost was "paid by plaintiff on June 8th, 1898," in each of the three cases (pages 455-456-459); the amount of the costs there recited as paid by the plaintiff in the Lorie case being

$57.15 (page 455); the amount recited as paid in the Geo. Eberle case by the plaintiff being $60.95 (page 456); and the amount of the cost there recited to have been paid by the plaintiff in the Henrici suit was $62.75 (page 459). In the Eberle suit there was a pencil memorandum, "Bill, S. G. & J. by request," in the court fees account kept in this book (referring to Scarritt, Griffith & Jones). (Pages 456-457-459). "By Mr. Scarritt—Q. That 'S. G. & J.' is opposite the sheriff's bill for $43.00, is it not? A. Yes, sir. Q. Scarritt, Griffith & Jones were the attorneys for the sheriff at that time, were they not? A. Well, I could not answer that question, for I do not know whether they were or not" (page 457)*. In the Henrici and Lorie cases the entry was "bill to plaintiff's attorney, 6-7-98" (pages 458-459). The entry, "bill to plaintiff's attorney, 6-7-98," in the other two cases is also written opposite the item of sheriff's fees in the bill of costs (pages 458-459).

Geo. Eberle and Joseph Lorie (the plaintiffs in the other two injunction suits), were called and examined as witnesses by the complainant. They both testified that they did not pay any costs in those suits (pages 448-450 incl.) Mr. Lorie, the record shows, signed as a surety for the Barber Asphalt Paving Co. the contract with Westport for the Baltimore Ave. pavement in question (page 158).

Mr. Wm. C. Scarritt, who was examined as a witness on this issue by the complainant, previously to the above

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**No further attempt was made by defendant to show by this witness, or by any witness, that Scarritt, Griffith & Jones were ever attorneys for the sheriff. By the Missouri statute in force then and since 1893 (Laws Missouri, 1893, page 168) in Jackson county the court fees taxed and collected in these three cases as due the sheriff, did not belong to him and were not payable by the clerk to him, but to the county. The clerk would have been guilty of a misdemeanor to have paid these fees to the sheriff or to have disposed of them otherwise than into the county treasury. Sections 5, 6, 7 and 8, Laws 1893, pages 170-1.*

named witnesses testified: That the Parker-Washington was a rival bidder of defendant in Kansas City for asphalt street pavements under the "Trinidad Lake Asphalt specifications," and that Kansas City had been prevented from letting contracts for street pavements to the Parker-Washington by the suits brought in the circuit court by property owners. On further examination he declined to answer questions of complainant as to whether the Barber Asphalt Paving Co., or its representatives, had anything to do with the suits in the circuit court opposing the Parker-Washington getting contracts they bid on. He also declined to answer complainant's question as to whether the Barber Asphalt Paving Co. had anything to do with resisting a mandamus proceeding instituted in the Supreme Court of Missouri by the Parker-Washington Co. concerning another asphalt pavement bid for, and declined to answer whether the Barber Asphalt Paving Co. employed attorneys to resist that mandamus proceeding (pages 116-117). He admitted having appeared with Hugh J. McGowan before the Westport authorities and having opposed the award of a paving contract to the Parker-Washington Co., on a lower bid of the Parker-Washington Co (page 114).

J. B. McGowan, (employee of Hugh J. McGowan,) called as a witness by complainant, declined to answer complainant's question as to whether he had contested the ability of the Parker-Washington to lay Trinidad Lake Asphalt (page 421)

Chas. F. Getty, (employee of Hugh J. McGowan,) called by complainant and replying to complainant's questions as to other contractors bidding for asphalt pavement in Kansas City and defendant's opposition to them, said, "Yes, there were fellows come in here, make a straw bid and bob out again." "We tried to keep them out when they came in and tried to get work *we had procured* and they had some cock and bull story and then it was legitimate to keep them out." "Bidding on things they could not supply" (pages 443-4).

Section L.

Why the street pavements were ordered and why Trinidad Lake Asphalt Was Specified therefor.

Hugh J. McGowan was the agent of defendant to procure orders and contracts of Kansas City and vicinity for asphalt street paving from some time in the year 1891 to 1898, inclusive, and he, or his employees, procured the orders and contracts from Westport for the paving in question in 1897 (pages 409-410, 437-438, 442, 68).

Hugh J. McGowan was experienced in municipal politics when he went into the employ of the defendant in the year 1891. He began as a policeman in Kansas City in 1880. After six years service on the police force he was, in the fall of 1886, elected marshal of Jackson county (the county in which Kansas City and Westport were situated) for a term of two years. In the fall of 1888, he was elected to a second term as county marshal (page 419). It was in 1891, shortly after this career of ten years in public office at Kansas City, Mo., that he went into the service of the defendant as its agent to procure orders and contracts for asphalt street paving from Kansas City and vicinity for defendant (pages 410, 442).

He and his assistants had and exercised a positive influence with the municipal boards of Kansas City and Westport as to when a street should be paved, and with what materials, and in what manner it should be paved (pages 473, 478, 488, 496; see also references hereinafter).

In 1896 and 1897, efforts were made in the board of public works and common council of Kansas City, Mo., to have open specifications for asphalt paving, and to do away with specifying the use of asphalt from a particular place. The Barber Asphalt Paving Company's representatives, Hugh J. McGowan and James B. McGowan, opposed the proposed open specifications and insisted on a continuation of the Trinidad Lake Asphalt specification for street paving in Kansas City. The proposal to have open specifications of

asphalt for street paving in Kansas City failed (pages 471-2. Also pages 474, 476-477, 482. Also pages 483-484-485).

The defendant had a construction office in Kansas City, Mo., (page 411). At this office was a bookkeeper, cashier and superintendent (page 412). This superintendent signed the bids (page 412) and contracts for the pavements, but had nothing to do with procuring the contracts (pages 436-437).

Hugh J. McGowan had no connection with the defendant's construction of the pavements, or with the construction office (page 435). He rented and maintained a separate office at his own expense and hired and paid three men, James B. McGowan (brother of Hugh McGowan), Chas. Getty and Wm. Norris, who assisted him in his work of procuring contracts from Kansas City and Westport for asphalt street paving (pages 411 to 413, incl.; 415 to 418, incl.). No book account of this expense was kept (pages 416, 440-441). James B. McGowan, who testified to all the above facts, declined to state the amount of such expense; also the nature or amount of the compensation paid by Hugh McGowan to his said assistants for their work in aiding him to procure for defendant contracts for street pavements (pages 416-417-418). Chas. Getty, another witness, refused to tell what his compensation from Hugh J. McGowan was for assisting in procuring contracts (page 440). Hugh J. McGowan was in Kansas City, Mo., from the beginning of his agency in 1891 to 1898, inclusive of the times of the pavements here in question, but before this suit was brought he moved to Indianapolis, Indiana (page 112), and during the time of the taking of the depositions in this case was in Kansas City only on short and infrequent visits (page 424).

The position, power and duties of Hugh J. McGowan, as agent of the defendant, are proven by testimony of Mr. Scarritt, defendant's solicitor, and by Mr. McGowan's employees, taken by complainant, as follows:

Mr. W.C. Scarritt testified that Hugh J. McGowan was the agent of the defendant, and of the scope of his agency

said: "I think his duties covered the whole *minutia* of secu ing contracts for work" from "both public and private pe sons who desired asphalt pavements" (page 109).

James B. McGowan testified as to the relations of Hug J. McGowan to the defendant, as follows: "I know he ha charge of Kansas City, Mo., and I think of the state of Mis souri." * * * "He was the agent of the Barber Asphal Paving Co." Q. "Their general representative you mean?" A. "Yes, sir." "Q. That is, before 1898, during 1897?" A. "Yes, sir." Q. "And of course that included Westport, Missouri?" A. "Yes, sir" (page 409). He began in the service of the defendant in 1891 or 1892, as agent, and with "the same powers as I presume he exercised" so far as Kansas City and Westport were concerned (pages 410-411).

The plan [redacted] method employed by Hugh J. McGowan, and his assistants, to procure contracts for defendant for street paving in Kansas City and Westport was as follows: When McGowan, or his assistants, determined to secure an order and a contract for defendant to pave a street, or part of a street, in Kansas City or Westport, a petition was prepared, which was in form of a request of residents who owned abutting lands on the street pavement proposed, asking the council of Kansas City or the board of aldermen of Westport, to adopt the required preliminary resolution declaring it necessary that the named street, or part of a street, should be paved with asphalt, and that such preliminary resolution provide that the asphalt to be used therein be "Trinidad Lake Asphalt" or "genuine Trinidad Lake Asphalt;" this petition the defendant's agents (McGowan or the assistants he employed) would circulate among such resident owners, and when signed by such majority of resident owners as they could get, would be taken by the defendant's agents, aforesaid, to the common council of Kansas City, or the board of aldermen of Westport, the municipal authority having the right to declare necessary or to order the proposed street pavement (pages 68, 73, 82, 98, 109, 411, 413, 418, 422-423, 435-436, 438, 444, 489).

(See the petitions for the three pavements in question, pages 120-145-169).

"When they (McGowan's assistants) thought a street could be paved they went out and got the names of the resident property owners. Non residents did not count." (Chas. Getty, McGowan's employee, page 435).

No action was ever taken by the board of aldermen of Westport to pave a street except upon such a petition to them, presented by the agents of the Barber Asphalt Paving Company (pages 68-499-500).

Whenever such a petition was presented by Mr. McGowan, or his assistants the common council of Kansas City, or the board of aldermen of Westport, always adopted the proposed resolution declaring it necessary that the street, or part of a street, be paved; and such resolution always provided that such pavement be an asphalt pavement, and that the asphalt used in such pavement be "Trinidad Lake Asphalt" or "genuine Trinidad Lake Asphalt," etc., exactly as requested in such petition. (Pages 74-82-104-439-494-5-6-500). And no question was ever asked as to how the signatures to one of these petitions were obtained. (Pages 501-2)

The same course of proceedings ~~were~~ was had and led to the municipal proceedings and to the procurement, for the defendant, of the contracts, for the three pavements complained of in this case (Pages 68-104-437-438).

The petition for the Main street pavement was filed March 29th, 1897, (page 120); the resolution declaring the work of paving Main street necessary was adopted by the board of aldermen the same day (pages 118-121-122). The petition to pave Baltimore avenue was filed June 14th, 1897, (page 141-146); the resolution declaring the work of paving Baltimore avenue necessary was adopted three days later, June 17th, 1897, (page 147); (whether this was or was not, the first meeting of the board of aldermen after the filing of the petition for the Baltimore avenue paving was not shown). The petition for the Wyandotte street pavement was filed

July 15th, 1897, (pages 167-169-170); the resolution declaring the work of paving Wyandotte street necessary was adopted the same day (page 171).

The Westport city authorities were cognizant of the following matters at all of the times in question in this case:

(1) They knew that the Barber Asphalt Paving Co. then and *theretofore had a* monopoly of Trinidad Lake Asphalt pavement in Westport, Mo. (Pages 69-104-497).

(2) They knew Hugh J. McGowan, and his assistants, and of their agency to procure for the defendant municipal orders and contracts for asphalt street paving. (Pages 415-491-2-3).

(3) They knew that the petitions presented for asphalt street paving with Trinidad Lake Asphalt were procured by the agents of the Barber Asphalt Paving Co. (Page 502).

The Westport charter (Sec. 95) authorized resident owners of land abutting on a proposed street improvement to protest against the necessity of such improvement and thereby defeat a resolution of the board of aldermen which proposed to levy the cost thereof against the abutting lands, but no petition was required or authorized, as the basis or preliminary to any action of the board of aldermen adopting the required resolution for a street pavement. (Pages 48-73).

After the time for protests of residents against a proposed street pavement, as provided in the respective charters of Kansas City and Westport, the common council of Kansas City, or the board of aldermen of Westport, would follow the adopted resolution with an ordinance of the city ordering the asphalt pavement, and with a contract for the work, providing that the asphalt used therein be of "Trinidad Lake Asphalt" or "genuine Trinidad Lake Asphalt," as in the resolution aforesaid. (Pages 67-436-489-496-500).

McGowan and his assistants attended the meetings of the common council of Kansas City, and the board of aldermen of Westport when the asphalt paving proceedings, inaugurated by them, were before such municipal bodies, and continued their attendance at such meetings from their pre-

sentation of a petition for a proposed street pavement until the contract was consummated by the final ordinance confirming the contract (pages 71-98-112-414-436 to 439-472-489-491-492-495). They did not speak to the common council or board of aldermen, as a body, or in the sessions of these bodies, but they spoke to the members thereof, singly, before and after the sessions of such municipal bodies. (Pages 414-415-439-472-473-478-479-480-488 489-490-492-493).

At Westport the agents of the defendant (McGowan or his assistants) circulated among the aldermen before and after the sessions of the board of aldermen and treated them in the saloons of Westport (pages 492-3).

There was a Yost typewriter machine kept in the Westport City Clerk's office for writing resolutions and ordinances of the board of aldermen. There was no other typewriter in the Westport offices. (Page 502). The ordinance levying the assessments for street paving were all written on this machine, but none of the resolutions or ordinances of Westport ordering asphalt street pavements (which specified Trinidad Lake Asphalt) were written on this machine. These were written on a different typewriter. (Pages 503 to 515). The pages of the asphalt paving ordinances were fastened together by an eyelet fastener never used in the Westport offices. (Page 505).

The resolutions and ordinances for the asphalt pavements were not drawn in the Westport offices but were generally brought out there already prepared by Jim McGowan, Getty or Norris—Hugh McGowan's employees (pages 494-5).

The resolutions and ordinances were adopted by the board of aldermen as prepared by defendant (page 503).

J. K. Griffith, one of the defendant's attorneys, called as a witness by complainant, admitted that he wrote the resolutions and the ordinances for the Baltimore Ave. and Wyandotte St. pavements in question (page 45). These resolutions and ordinances specified Trinidad Lake Asphalt

as the asphalt required for these pavements (pages 147-171). There were other companies in the field for street paving in Kansas City, with other paving materials (pages 101-99).

The engineer of Westport advertised for bids for asphalt street pavements in question (pages 67, 88).

Each of the contracts for the pavements in question recite the following as the premise for the award of the contracts to the defendant:

"That whereas, the said party of the first part is the lowest and best bidder," etc. (pages 124-149-173).

Section M.

As to the need of the three Pavements.

Main St., Baltimore Av. and Wyandotte St. (paved streets in question) are consecutive and parallel streets, north and south streets, in Westport (pages 188-189).

The center of 31st St. (Springfield Av.) was the south boundary line of Kansas City, and the north boundary line of the city of Westport (page 195), Westport then being a southern suburb of Kansas City (page 410). The east and west streets through Westport were numbered from 31st St. to 48th St.; 31st St. (Springfield Av.), the first east and west street of Westport, is the north end of the Main St. pavement in question (pages 195-352). 33rd St. is the second east and west street from the north side of Westport and is the north end of the Baltimore Ave. and Wyandotte St. pavements in question (page 195). Westport Ave. (a cross street) is the south end of the three pavements in question (pages 195-348). There are seven cross streets through the paved district in question, to-wit: 33rd, 34th, 35th, 36th, 37th, 38th and 39th streets and Westport Ave (page 195). The north end of the three pavements is two miles and the south end is three miles from the business center of Kansas City, Mo (page 189). There is a mile and a half of intervening residence property—some of it rather rough (page 189), intersected with deep ravines and draws (page 190).

Most of the lands fronting on the three street pavements were in 1897 and are yet vacant. Whole blocks then and yet without a single house thereon (pages 84-85-93-142-189-195-196-207) and along most of the pavements on Baltimore Av. and Wyandotte St. there ~~is~~ are yet no sidewalks (pages 196-7-8).

Main St. is the principal street from Westport into Kansas City (page 190). The street railway from Kansas City through Westport was on this street (page 205). Main St. was macadamized by the county court in 1887 from 31st St. to 39th St. (pages 85, 374, 377) which part of the paving district in question, 31st St. to 39th St., was not then in the limits of either Westport or Kansas City, but was between the two cities (pages 193-196-220-352-353). The remaining part of Main St., covered by the asphalt pavement in question, the south block thereof, to-wit: from 39th St. to Westport Ave., was paved with a 12-inch macadam pavement and the cost thereof charged to the abutting lands by the city of Westport, in the year 1892 (pages 72-84-93-198). On the east side of this block of macadam pavement was the street car barn and some small store buildings. On the west side thereof are the complainant's vacant lots—lots 1 to 5 inclusive, in block 45, and on the lots south of complainant's lots was a street car used as a confectionery. There was not a residence on either side of Main St. in this block (pages 74-82-83-84-196-198-296-7-8 and top of page 238). The macadam pavement on that part of Main St., from 31st St. to 39th St., laid by the county court in 1887, was much worn and in need of replacement in 1897, when the asphalt pavement thereon in question was laid by defendant, but the macadam on that block or part of Main St., from 39th St. to Westport Ave., aforesaid laid in 1892, by authority of the city of Westport, Mo., and charged to the abutting lands, was a good and substantial pavement, in no need of repair or of being replaced by another pavement for the public use or for safe and convenient travel thereon in 1897, when the asphalt pavement in question was ordered

(The record reference of defendant's witness Macadam relate to the 31st St. and do not relate to the block of macadam laid by Westport on Main St. between 39th St. and Westport Ave. or to the macadam laid by Westport on Wyandotte St.).

laid on Main St. As to this block from 39th St. to Westport Ave. on Main St. in 1897, to change the surface thereof from macadam to asphalt was a mere matter of taste (pages 72, 84, 93, 198, 284, 345, 347-348, 349, 386, 387).

Wyandotte St. was much traveled over in 1897, when the pavement in question was laid thereon. This part of Wyandotte St. was macadamized and the cost thereof assessed against the abutting lands by the city of Westport in 1893 (pages 72, 84). This macadam pavement on Wyandotte St. was a good and substantial pavement, and in no need of repair or replacement for safe and convenient travel thereon in 1897, when the asphalt pavements in question were ordered, contracted for and laid thereon (pages 72, 84, 93, 197-198, 284, 345, 347-348 349, 386-387). There was a protest of resident owners against the asphalt pavement in question thereon but not by a sufficient number to defeat the proceedings therefor (page 168).

Baltimore Ave. was parallel to and between Main St. and Wyandotte St., 280 feet west of Main St. and 260 feet east of Wyandotte St. (pages 188-189). In 1897, when the pavement in question on Baltimore Ave. was declared necessary, ordered and done, there was, as stated in preceding paragraph, a good and substantial macadam pavement on the whole of Wyandotte St. parallel thereto (see references in preceding paragraph) and the Main St. pavement in question was then in course of construction (pages 124, 135, 147, 149, 161). Baltimore Ave. was a dirt street in Westport until 1897, when the asphalt pavement in question was laid thereon (page 72). There were then only 12 houses on both sides of the mile of pavement in question (pages 84, 142, 281).

The pavement, on each of the three streets, is a mile long (pages 84, 189, 195, 219). The amount paid defendant in tax-bills for these pavements, respectively, was as follows:

For Main street, $47,019.67; for Baltimore avenue, $24,512.00; and for Wyandotte street, $31,908.54 (page 12).

The orders and contracts for the three improvements in question were all within four months time:

The Main street pavement was contracted for May 17th, 1897, (page 124). The Baltimore avenue pavement was contracted for July 26th, 1897, (page 149). The Wyandotte street pavement was contracted for Sept. 11th, 1897, (page 173).

Section N.

Benefit of the Pavements to Complainant's Property.

Defendant called no witnesses upon any of the matters hereinbefore recited. Defendant alleged in its answer that the lots or tracts of land fronting on each of said streets within the distance improved are in one of the most fashionable and rapidly developing locations in Kansas City, Mo., and were enhanced and increased in value by reason of the pavement of the said street with asphalt, directly in proportion to the frontage of each lot, or tract of land upon such improvement, and to an extent greater than the amount charged against such lot or tract of land to pay for such pavement (page 10). This was put in issue by complainant's general replication (page 14). The testimony elicited on such allegations of the answer was as follows:

GEORGE L. LOVE, City Clerk, (called by complainant on other issues) on cross-examination by Mr. Scarritt, testified:

There were some handsome residences on Main street when the pavement in question was laid thereon, (about twelve of which were named by the witness).

A. W. Armour and Mr. Kirk Armour and Mr. Ed Smith resided on 35th and Walnut streets, (a block east of Main street). These are some of the handsomest residences

in the city and they use this Main street passing backward and forward from their homes to Kansas City (pages 76-7).

There were several good residences on Baltimore avenue before the pavement was laid, and there are some "nice residences" built since then.

South of 36th street Wyandotte street is built up with a good class of buildings—there is one house north of 35th street. Speaking generally, this district is one of the handsomest residence districts of Kansas City (pages 77-8).

RE-DIRECT EXAMINATION.

I heard a man talking about it—if he could get a livery stable in there (39th and Main), he would like mighty well to get it. I would not put a livery barn there (page 83). I could not suggest an improvement there that would pay 2 per cent on the investment (page 84).

There were 12 or 13 houses fronting on Baltimore avenue before the pavement in question; a large portion of the street was vacant and unimproved at that time (pages 85-142).

RE-CROSS EXAMINATION.

It is mostly vacant yet (page 189). Twenty-five new houses fronting on Baltimore avenue have been built since the pavement. "They are nice residences," not all very fine, but I believe the restrictions require $4500. That section has developed rapidly. New residences are being built on streets paved with asphalt very largely. I do not know as to the necessity of paving streets in order to get people to live out there. People like to live out there (page 142).

RE-DIRECT EXAMINATION.

I think C. E. Finlay Real Estate Co., and its connections have built the larger portion of these new houses. I suppose they have been built for the purpose of selling them. Mr. Finlay lives in Westport but not on Baltimore avenue. I do not know anything as to the cost of those houses only in relation to the selling price of them. I do not know only the price he held on them. The houses I was speaking of were on Baltimore avenue, north of 38th street, between 37th and 38th streets. There are about 9 or 10 of these houses. I do not know just what is meant by fashionable street. I think there are some very excellent people that

have bought property built in that way (page 143). I know Dr. Barber has bought one, he is the head of a school of Osteopathy here. I do not know about this running a fraudulent school of Osteopathy. I do not know whether he is the most excellent acquisition to that neighborhood. I did not say these people were the most excellent. I said some most excellent people bought houses on that plan. In my business I left Westport and came to Kansas City and have been away from there in my business relations and do not keep my business acquaintances as before, but I notice the people who get off and on the cars that come from that portion and they look to be very respectable people. I think I heard of some trouble Dr. Barber had. Some of the property has been bought outright. It is a matter of opinion whether it is a detriment to the value of the property to have people who buy houses on the installment plan mortgage them back, instead of having people who build houses according to their own selection. I think a man who has a good position, reasonably permanent, with a good salary, if he buys him a home I think he would pay for it out of his earnings or salary, and it is a very good thing. I do not like to testify on the point as to whether that class of population add to the value of the property. The property has advanced in price very materially since it was built up (page 144). In speaking of C. E. Finlay and his purchase of property in the vicinity in question the witness said: "Well, he never paid any more than he had to" (page 167). Some of the buildings and places about which Mr. Scarritt has questioned me are more than half a mile south and west of complainant's property (pages 193-4). The cable railway runs out Main street, the main thoroughfare from Kansas City (page 194).

J. C. TATE, (called by complainant on another issue).

CROSS EXAMINATION BY MR. SCARRITT.

Six handsome residences fronting on the Main street pavement in question; one handsome residence costing $25,000 on Baltimore avenue, the Westport Baptist church on Baltimore, and on Wyandotte street, there were quite a number of good houses and a number have been erected thereon in the last two years, but the course of development out in that country is all of it very slow (page 94). Balti-

more avenue was improved generally, and the property fronting thereon, by this paving. It was a dirt road before this was put down; since then it has been quite a beautiful thoroughfare (pages 94-5). Wyandotte street has been benefited considerably by the asphalt paving (page 95).

RE-DIRECT EXAMINATION.

Property is selling slowly out there (page 95). There is one piece that has sold for more since the paving—a very high, sightly place on Main street, the Taylor property. The complainant's property is worth from $20 to $30 a foot less than the Taylor property.

Finlay bought property between 37th and 38th streets on Baltimore avenue since the asphalt pavement was laid for $25 a foot, which had previously been sold some seven or eight years before at about $44 per foot. There was a general depreciation of real estate in Kansas City after the Kansas City boom was over (page 96). There has been a great deal of paving done in residence neighborhoods and that has made quite a large supply of vacant property on well paved thoroughfares (page 97). The property in Hyde Park, out where complainant's property is situated, depreciated less than nearly any part of the city, from the lapse of the boom. They had the best system of transportation out there in the city. You can get out there better than to almost any other part of the city. This street car system, more than anything else, maintained the values out there (pages 101 and 102).

E. H. PHELPS, testified:

DIRECT EXAMINATION BY MR. SCARRITT, APRIL 12, 1900 (page 210).

Real estate agent 18 years in Kansas City. Familiar with the value of property in Hyde Park and Westport for 10 years, more especially (page 210). Familiar with the Main street pavement in question and think the lots fronting on this part of the street benefited much more than the cost of the pavement (page 211). I think they are worth $8 to $10 per front foot more. All lots benefited equally,

just in proportion to size of the lot. In other words, each lot would be benefited specially just in proportion as the frontage of each lot bears to the frontage of the ground abutting on the pavement (page 212).

(His testimony of benefit of the Baltimore avenue and Wyandotte street pavement to abutting lands the same as the testimony aforesaid of benefit to abutting lands on the Main street pavement, page 214, 216).

ON CROSS EXAMINATION BY COMPLAINANT, SAID.

Main street is a street running through Westport into Kansas City. Baltimore avenue and Wyandotte street come to a dead end at 33rd, the north end of the pavements. Travel from there into Kansas City has to go east one block to Main street or west to Broadway or Penn (pages 218-219).

The three streets in question, Main street, Baltimore avenue and Wyandotte street are parallel and consecutive streets, Baltimore avenue being 250 or 275 feet west of Main street and Wyandotte street being about the same distance west of Baltimore avenue. Each pavement is about a mile long (page 219). Property in that neighborhood during the height of the boom in 1887 would probably have sold for $15.00 per front foot. Did not remember that Mastin paid $40 a front foot for property out there in 1886 or 1887. House costing from $2,000. to $2,500. built on 35 feet of ground out there would rent for 8 per cent. gross. The money to build with can be borrowed at 6 per cent. Complainant's land is worth $35 or $40 a foot (page 229). Property opposite complainant's sold since the pavements, and within a year, for $28 per foot (page 230). Have been a witness very frequently in city condemnation proceedings to take lands for streets. Employed by parties to look up the values and then come in and testify. Certainly expect something beyond witness fees in this case. It is purely a business transaction (page 232-233).

WILLIAM S. WOODS, April 12, 1900 (page 238).

ON DIRECT EXAMINATION BY MR. SCARRITT.

In real estate business in Kansas City, Missouri, about ten years and frequently called upon as witness to testify to values of real estate in Kansas City. Familiar with the value of real estate on the three street pavements in question. All of the lots abutting on Main street are benefited at least $8 to $12 per front foot by pavement. The lots on Baltimore avenue and Wyandotte street (each and all of them alike) were benefited about $10 a foot (pages 239-241).

ON CROSS EXAMINATION BY COMPLAINANT.

Real estate market not active. Been dull for ten years. Better the last two years but not good yet (page 242). The property on 35th and Main streets regarded as one of the select neighborhoods of the town (page 247). Do not think Mr. Finley could have afforded to build the houses on Baltimore avenue but for the pavement thereon (page 249). Do not think that the installment houses, built by Mr. Finley, have hurt Baltimore avenue. I once owned a large amount of real estate in Kansas City—mortgaged it and lost it all (page 250). Would borrow money at 6 per cent, payable in five years, and build houses on complainant's lots. Say, house costing $3500 on each lot, counting the lots at $1750 each. This would make a gross investment of $5250 on each lot. Such a house would rent for $540 a year, which after paying interest on the loan would leave $190 to pay taxes, insurance, etc., if there were no loss of rents (page 251-2). An ordinary man could not get $3500 on one of these lots and handle the money himself. Complainant might (page 251). After the house is built the owner can borrow 60 per cent of the lot and improvement—this would be $3120—$380 short of the required sum, $3500, to build the house; this balance for each house might be secured on a second mortgage bearing 8 per cent interest by paying commission of 10 per cent for the loan (page 253).

Was a witness once before for the Barber Asphalt Paving Co.—for the Forest Ave. paving tax-bill case. That company, and everybody that I testify for usually pay me for my services. It is the practice of real estate men here generally to do that (254-5).

E. R. CRUTCHER:

DIRECT EXAMINATION BY MR. SCARRITT, APRIL 14, 1900 (page 257).

Residence, Kansas City, Mo. Business, real estate and fire insurance (page 257). I am familiar in a general way with the property of complainant involved in this suit. I think that the market value of every lot on Main St., Baltimore Ave. and Wyandotte St., between 33rd St. and Westport Ave. had the market value increased by at least $10 per front foot because of this paving (page 258). I think the ratio of benefits to each of the lots is the same in proportion to the number of feet frontage. This statement applies to the distribution of special benefits on all the streets (page 259).

CROSS EXAMINATION BY MR. SMALL FOR COMPLAINANT.

Don't remember when this pavement was laid. Could only state that values in this immediate vicinity have fluctuated considerably in the last three or four years on account of special local reasons and I could not state definitely what these lots could be sold for at any particular time. In the statement made that these lots were increased in value at least $10 per foot by the pavement, I meant that if the lots were worth $50 at any particular date they were increased to $60, but if these lots become depreciated to $30 a foot they would be worth $10 more with the pavement than without it (page 260). It is true that there is no activity in real estate now but we do not attribute it to the number of paved streets (page 263). There has been a great deal of building in the neighborhood of complainant's property in the south part of town in the last three years. As a general proposition I cannot say that the price of vacant property in that part of town where all these houses have been built has increased in the last three years. The present condition of the real estate market is a mystery to those conversant with it (page 266).

A. B. BEEDLE:

DIRECT EXAMINATION BY MR. SCARRITT, APRIL 16th, 1900 (page 271).

Reside, No. 3608 Baltimore Ave. on one of the street pavements in question. Remember the fact of the laying of

the asphalt pavement on these three streets in the fall o 1897 (page 271). Am familiar with the lots of complainan described in the bill of complaint in this case. In my opin ion they were benefited by the pavements as much as $5 pe foot. Price of the lots was advanced $10 per foot as soo as pavements were put in (page 272). I know of no reaso why any one lot should be benefited more, according to it frontage, than any other lot by reason of the improvemen on which it fronts. I have lived on that part of Baltimor Ave. about 10 years; I moved there in 1890. The demand is now for lots on improved streets (page 274).

CROSS EXAMINATION BY COMPLAINANT.

Remember when there was an active demand for real estate in Kansas City and out there. That was considered a very fine suburb. Most of these houses have been built out there since the pavement were built by Mr. Finley on Baltimore Ave. I do not know what they cost (page 275). They were built and usually sold on the installment plan (page 276). I cannot recall any sales of property made out there in 1898 (page 280). The Barber Co. called on me with their petition for that work. There were very few houses on Baltimore Ave. at that time. There was nothing north of 36th St. up to 33d on Baltimore Ave., three blocks, and there was only one or two houses between 37th and 39th St. (page 281). Could have sold property on Baltimore Ave. in 1896 at $30 a foot. Did not know Mastin sold property to Finlay for $27.50 a foot since the pavement. I would not give $30 a foot for the southwest corner of 36th St. and Baltimore Ave. (page 286).

CHARLES E. FINLEY:

DIRECT EXAMINATION BY MR. SCARRITT, APRIL 17th, 1900 (page 287).

I reside at 4031 Warwick Blvd. Been buying and selling real estate in Kansas City 14 years. Built 190 some odd houses, I believe, in the last six years. I built some houses on Baltimore Ave., Main St., and Wyandotte St. Am familiar with the lots owned by complainant in this case described in the bill of complaint. I should think these lots were especially benefited, on each street, by the pavement, on a conservative estimate $10 a foot (page 288).

Know of no reason why any one of the lots on either of these streets along the distance improved was not benefited to the same extent relative to its frontage that the other lots along the street were. See no difference at all (page 288). I sold property on these streets which I consider I could not possibly have done but for their being paved. I purchased a block of ground between 35th and 36th on Baltimore Ave. and sold that, however; and had a client who bought, at my suggestion, a block of ground on Wyandotte St. between 37th and 38th, on which I sold some lots and built some houses. I bought the ground there at about an average of $28 a foot and sold it at about, after putting down the stone sidewalks, $38 to $40 (page 289). The houses I built on these lots run from about $4,000 to $5,500. Average prices at which I sold these lots, exclusive of the buildings thereon, was sold, $40 to $45 (page 290).

CROSS EXAMINATION BY COMPLAINANT.

I bought those lots a little over two years ago, since the pavement was put down. I think it was about $26.50 a foot I paid Mr. Mastin for them (page 291). I built to order Mr. Howe's house, Mr. Will Irvin's, Mr. Adams' and Mr. Clendenning's. These were all I built to order between 37th and 38th street on Baltimore avenue. I should say I built one-fourth of them to order. The other three-fourths I built to carry till I could sell them. On these three streets I have built, I should think, about 28 or 30 houses. In figuring these lots as sold at $40 to $45 a foot I gave the lots the benefit of the whole profit on them and improvements in sales made (page 292). The installment plan of sales of this property was as follows: One-fourth cash, one-fourth in monthly installments, and one-half running a period of five years. These installments bear interest at 6 per cent. from date of note. For instance, if I sell a house for $6,000 they pay $1,500 down, there would be $1,500 payable in monthly installments, about $50 a month, and the other half runs for the period of five years, interest payable semi-annually on the whole. If there is a default the whole becomes due. Never had a foreclosure on any of these streets. I am pretty nearly out on monthly payments on most of them. The market here for real estate is very unsatisfactory for a property owner. It is pretty hard for a man to realize what his property is worth. It has been so for the

past ten years. That comes simply because the outside people do not seem to appreciate the value of property. I do not know of a piece of ground in Kansas City that has been well sold in years. It would be an isolated case if I knew of a piece well sold (page 294). I think property out there has maintained its prospects better through the dull market periods than any other property in Kansas City. It is a new country (page 295). It was sought after during the busy times for speculation purposes more than using it for homes—it was held very high—they had building restrictions of $4,000 on Baltimore and $12,000 on Main street (page 296). I bought some property on Baltimore avenue south of the church, near Westport avenue, cost me $23.32 a foot. Got the funds for making improvements from some other person (page 297). These improvements I have made have been partially by my own funds and partially by other people's. Dr. C. C. Olmstead and Dr. Barber were among those to whom I have sold property. Dr. Barber is an osteopath (page 297). Mr. Armour being on Warwick boulevard helps to sell property out there, and I think that all nice residences help to establish the value. Mr. Armour's house cost $50,000 or $60,000 or more. It is largely true that a man of large means generally builds his own house (page 298). It is only in a general way I said those houses cost $4,000 to $6,000, I do not want to tell what any of them cost—my houses cost me from $3,200 to $4,800 (page 303).

R. H. FIELD, in rebuttal, on his own behalf, May 9th, 1900, (page 343).

"On the question of benefit to property on account of the pavements in question and the market value of the same I wish to say this, that I do not consider that there has been any market value for real estate in that district since August, 1887." (page 343). "I do not see how the benefit to this property and its market value can be estimated or stated when there has been no market and no scale of prices per lot or per front foot during the time that I have named; until within two years ago, at the farthest two and a half years ago, from about 1889, I do not believe there were 10 residences built *in all Kansas City's residence district*, that cost

$10.000 each. I do not believe there were 25 residences constructed between 1889 and 1897 that cost $7,500.00 each, and I do not believe there were 50 residences, built from 1889 to 1897, costing $5,000.00 each. Not only from 1887 to 1897 was there a depressed state in the market of real estate or improvement of real estate, but within the past three years real estate has not increased in value to what the owners think it ought to be worth, while our special taxes have been continual and on the increase. We have had not only these pavements in the outlying districts but we have had all manner of special improvements, parks containing one hundred to two hundred acres have been condemned and the cost assessed as special taxes, and we have had additional laws passed in Kansas City allowing them to levy a maintenance tax throughout the district without reference to the fact whether the property assessed fronts on the improvement or not, some of the property two miles away from the improvement, so that whatever increase Kansas City has had in the past two years is due to the general condition in other matters being better. We hope we are now on the up-grade, but the market is not yet such a market as we would call a market value for real estate.

I desire to state that of the seventeen lots described in the bill in this case I have not had inquiries from any proposed purchaser for exceeding three of those lots within the past ten years. I sold two lots whereon the Baptist church mentioned in the testimony of defendant was constructed in 1889, nearly two years after the so-called boom, for fifty-five dollars a foot all cash, and there wasn't a pavement, no curbing or even sidewalks except maybe a wooden sidewalk in front of the property, and I have not during my knowledge of the history of property in that district known it to sell so cheaply as it has within the past two years. I bought lots one and two, seven and eight, block 39 Hyde Park, described in this bill in May I think, 1889, May or June—I think it was May, and I then paid I think it was nine thousand dollars for those lots. There is a frontage of 110 feet on Baltimore avenue and 110 feet on Main street. This purchase was made by me eight years before the pavements in question. There was a lot on Main street, lot number 4, block 39, fifty feet south of the lot I have just named, tnat during this year was purchased for forty dollars a foot and

can be bought for that sum today from the present owner. It belongs to a son of A. M. Allen of Westport and I had it offered to me day before yesterday" (page 344).

Section O.

Complainant's knowledge of the Paving Proceedings.

There is no proof: That complainant invited or encouraged defendant or the Westport authorities to lay the pavements or either of them; or that complainant knew either of the paving proceedings were contemplated before the defendant's procurement of the municipal order and contract therefor; or that the complainant, before the completion of the work, and issue of the special tax-bills, had any knowledge of the custom and course of action of the Westport authorities to adopt resolutions declaring asphalt street pavements necessary, enact city ordinances ordering the work and contract therefor, on petition of resident abutting land owners, procured and presented by defendant; or of the provision in each of the resolutions, ordinances and contracts that the asphalt used therein for these pavements should be Trinidad Lake Asphalt, or that the municipal proceedings for the pavements in question were procured by defendant in the manner alleged and shown.

By way of new matter in its answer filed in this case, the defendant made the following allegations as to complainant's knowledge of the municipal proceedings in question:

"This defendant admits that the complainant, R. H. Field, was not at the time the contracts were made for and the work of paving the streets done, as aforesaid, a resident of the city of Westport, but states that the said Field was at such times a resident of Kansas City, Missouri, and knew that the said contracts were being let and that the said work was being done and that he did not at any time object to, protest or remonstrate against the doing of said work until after the completion thereof by the defendant herein, and its acceptance by the said city of Westport, and that the said

Field, at all times, consented to the paving of said streets by this said defendant, and the improvement of his property thereby" (page 10).

This allegation was put in issue by complainant's replication (page 14).

No testimony was offered by the defendant to support any of these allegations in its answer. The complainant testifying in support of allegations in the "Twelfth" charge of his bill of overtures of compromise, said:

"When I learned that this Main street was going to be paved, or about to be paved, I went out on the car to this block 45, "Hyde Park," and noticed the macadam fronting on this lot 45. It had been swept preparatory to laying this asphalt pavement. * * * When I first learned they were going to pave Main street and the contract had been actually let I met Mr. McGowan and told him that I thought it was an outrage that I should be put to the expense of paving this block 45 again—and said to him I did not think it was exactly right for me to have to bear a fresh burden, and there was some talk that we could arrange the matter, and I had it in my mind to bring an injunction suit at that time, but the idea was given to me it would be arranged to my satisfaction, so it went on. I did not know exactly when the work was done on Baltimore avenue and Wyandotte street, it lies from three to four miles from where I live. It was done very quickly but I had information it would be done, or had been done, and I went out and saw it was done very shortly before Kansas City extended its limits and took in Westport" (pages 198 and 199).

There was not another word of testimony given or offered touching the subject of complainant's having any knowledge or notice of the proceedings of Westport and defendant as to these pavements, before the work was completed and the tax-bills were issued except such constructive notice as may be implied from the adoption and publication of the resolutions required by section 95 of the Westport charter and the journal of proceedings of the board of aldermen.

Section P.

Points and Authorities.

The following are the propositions of law and citations of authority based upon the foregoing statement of the case:

I.

The provisions of the Missouri legislative Act (Session Acts 1895, pages 85 and 86, sections 88 to 95), under which the tax-bills in question are claimed by the defendant as liens upon the complainant's real estate, deprive the complainant of his said real estate without due process of law, and deny the complainant, a resident of Kansas City, the equal protection of the laws afforded to resident owners of property in said city of Westport, and take his property for the private use of said residents of Westport, and violate section 1 of the 14th Amendment to the Constitution of the United States.

See the provisions of the Missouri legislative Act in question quoted (pages 23 to 26, *ante*).

The parts of the record in this case, upon which the above proposition is based, are the following:

"Fourth" charge of the bill quoted pages 3 and 4 *ante.*

Proofs stated and cited in sections "H" and "I" page 27 *ante.*

Adverse decision of the circuit court (decree, Pr. Rec. page 23; Opinion, Pr. Rec. page 517).

Complainant's assignment of errors, No. 7 and No. 8 (Pr. Rec. page 26).

Sections 88 to 95 of the state legislative Act, aforesaid, contain all of the provisions, conferring power upon a Missouri city of the fourth-class, to assess the cost of a street pavement against abutting lands. The complainant's contention is that these eight sections of the said state legisla-

tive Act are vitiated by the italicized provision in the quotation of section 95, which follows:

"Sec. 95. When the board of alderman shall deem it necessary to pave, macadamize, gutter, curb, (when such curbing is set out into the street beyond the sidewalk) or otherwise improve any street, avenue, alley, or other highway, or any part thereof, within the limits of the city, for which a special tax is to be levied as herein provided, the board of aldermen shall, by resolution declare such work or improvements necessary to be done, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks; *and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such improvements, then the board of aldermen shall have power to cause such improvements to be made, and to contract therefor, and to levy the tax as herein provided.*" (What follows in this section has no reference whatever to street pavements, or assessments therefor).

Not due Process of Law.

The absolute power over street improvements, conferred in this statute upon the majority of the residents who own adjacent lands cannot escape observation. No rule or reason is prescribed for the exercise of such power. This resident majority may act as freely without a reason as with a reason, and their action is to the same effect when done for a selfish or sordid reason as if done for the public weal. No right is reserved to the municipal authorities by even a unanimous vote to proceed in opposition to a remonstrance of such resident majority, no matter the public convenience or necessity, and no matter the paucity of land on the street owned by such remonstrators. And no provision is anywhere made for a review or reversal of unjust or arbitrary action on their part. This provision of the statute cannot be ignored or disregarded. When the remonstrance authorized by this statute is filed by such resident majority, such remonstrance arrests and destroys the power of the

board of aldermen to order and contract for a proposed street improvement at the cost of adjacent lands, and being prohibited by the statute, a municipal order for the work and assessment of the cost ~~of a street improvement~~ thereof to adjacent lands, in spite of such remonstrance, is held to be utterly void.

Knopfi v. Roofing & Paving Co., 92 Mo. App., 279;
Brady & Curby v. Rogers, 63 Mo. App., 222.

Had the statute in question made the consent of the majority of all who own land fronting on a proposed improvement, rather than only of those who reside in the city, the basis of municipal power to make such improvement, this would not then have been due process of law. The point here is simply this: The statute in question is contrary to the law of the land because of the power named which it vests in mere individuals over the affairs of the public and third parties.

"It is impossible to sustain a delegation of any sovereign power of government to private citizens, or to justify their assumption of it."

Shumway v. Bennett, 29 Mich. 464-5;
See also *Yick Wo v. Hopkins*, 118 U. S. 356;
Ex-parte Sing Lee, 96 Calif. 354;
State v. Garibaldi, 44 La. Ann. 810-813;
Walsh v. City of Denver, 11 Col. App., 523;
City of Sioux Falls v. Kirby, 6 S. D., 62;
City of Plymouth v. Schultheis, 135 Ind. 339;
Wells v. Weston, 22 Mo. 388-389;
St. Louis v. Russell, 116 Mo. 248;
State v. Field, 17 Mo. 54;
Cicero Lbr. Co. v. Town, 176 Ill. 26-27;
Thomas v. R. R. Co. 101 U. S. 71;
Robison v. Minor & Haug, 68 Mich. 555-556.

The above authorities are pointedly to the effect that this statute could not be sustained on any assumption that

the power conferred upon resident owners would be exercised by them in a reasonable, neighborly and a patriotic manner. The natural assumption is that such power would be exercised selfishly and oppressively.

Harward v. St. Clair Drain Co. 51 Ill. 135;
Cooley on Taxation, 2nd Ed. 364.

(*a*) Furthermore, the guarantee of "due process of law" in the 14th Amendment to the Constitution of the United States, protects private property against being taken or taxed for private use.

In re Tuthill, 163 N. Y., page 138;
Stratton Claimants v. Morris Claimants, 89 Tenn. 501-535;
Robinson v. Swope, 12 Bush (Ky.) 22;
Mo. Pac. Ry. Co. v. Nebr. 164 U. S. 403, and cases cited;
Fallbrook Irrigation District v. Bradley, Id. 158-166.

A statute like the one in question which authorizes taxing the cost of paving a public street to adjacent lands, only when a majority of the resident owners of such lands do not remonstrate against the improvement in its meaning and effect authorizes such taxation for the private use of such residents and for that reason violates the law of the land.

In re Tuthill, 163 N. Y. 133;
Davis v. Board of Commrs. 65 Minn. 310;
Wickey v. Stearns Ranchos Co. 126 Calif. 150;
In re Thereasa Drainage District, 90 Wis. 301;
Reeves v. Treasurer Wood Co. 8 Ohio 333-346;
Attorney General v. City of EuClaire, 37 Wis. 401;
Cypress Pond Drainage Co. v. Hooper, 2 Metc. (Ky.) 350;
Keene v. Driggs Drainage Co. 45 N. J. L. 91-95;
Dickey v. Tennison, 27 Mo. 373;
Colon v. Lisk, 153 N. Y. 196-197-198.

If the Missouri Legislature intended to restrict the exercise of the privilege conferred upon residents in this statute for the public weal or the protection of others likewise interested, words to that effect should have been employed.

See authorities above cited.

"It is impossible to say that property has been taken by 'due process of law' unless the statutes provide expressly for every constitutional safeguard."

Powers Appeal, 29 Mich. 509-510.

A Denial of Equal Protection.

It will be observed that the privilege conferred by this statute upon the resident owners is literally *per capita*, and not one to be exercised according to frontage of land on the proposed street improvement owned by any resident, and of the most arbitrary character. The testimony shows that the city authorities of Westport placed a literal interpretation upon this statute, and utterly ignored non-resident owners of lands adjacent to a proposed street improvement. That is to say, non-resident owners of land abutting upon a proposed street improvement liable to be taxed, were not counted nor considered by the city authorities of Westport, while Westport owners of land, whether living on their lands fronting on the proposed street improvement or in another part of the city, were counted by such city authorities, in determining the sufficiency of a protest, to thwart city proceedings for a street improvement under this section of the City Charter (Pr. record, pages 73, 168, 435). In other words, if there were only three residents of a town who owned land adjacent to a mile of street improvement proposed, two of such residents, owning but 25 feet of such adjacent lands, entrenched by this statutory protection conferred upon them (as enforced in Westport), would be in position to dictate to the city authorities the grade of the entire street, and the materials and the manner of the work and to force concessions from the contractor seeking the job, all to their own advantage and profit and to the disadvantage and

loss of the other owners of such adjacent lands liable to be taxed with the cost of the improvement. This is unquestionably true as this statute is construed and enforced in Missouri.

Knopfi v. Roofiing & Paving Co., 92 Mo. App., 280;
City of Kirksville v. Coleman, (Mo. App.) 77 S. W. Rep., 121.

"Extreme cases are allowable to test a legal principle." Said Chief Justice Shaw in *Commonwealth v. Essex County*, 13 Gray, 253.

It is however, not necessary to the invalidity thereof, to prove that such action has occurred under the legislative enactment in question, "the fact that it may possibly happen, is enough to condemn the law." *City of St. Louis v. Allen*, 53 Mo., 55. See also to the same effect:

Colon v. Lisk, 153 N. Y., 194;
Dexter v. City of Boston, 176 Mass., 247;
Brown v. City of Denver, 7 Colo., 305;
Louisville etc. Co. v. Eubank, 184 U. S. 35;
Collins v. New Hampshire, 171 U. S., 33-34;
Minnesota v. Barber, 136 U. S., 313.

(In the later points of this brief will be found references to facts, alleged and proven in this case, which show an ill use of this statutory privilege in these and like proceedings, by and between defendant Paving Company, the resident land owners on each particular street paved and the Westport city authorities).

The value of the protection afforded by this statute to resident owners is obvious:

(*a*) The nature of a public improvement might be such that the adjacent lands, or some of them, would be damaged, or at least not benefited equal to the cost. Neither

of these consequences would be any defense to an assessment of the cost of such street improvement.

McQuiddy v. Smith, 67 Mo. App., 205;
Moberly v. Hogan, 131 Mo., 19;
Keith v. Bingham, 100 Mo., 300;
French v. Barber Asphalt Paving Co., 158 Mo., on page 556;
Same case, 181 U. S., on page 335.

(*b*) The grade of a proposed improvement might be such as to greatly inconvenience or damage adjacent lands proposed to be used therefor, yet, in states where there is no statute or constitutional provision creating a liability therefor, there would be no right of action against a city for damage for any such authorized improvement.

Householder v. Kansas City, 83 Mo., 492;
Transportation Co. v. Chicago, 99 U. S., 635;
Eldridge v. Trevezant, 160 U. S., 452;
Scranton v. Wheeler, 179 U. S., 141.

While upholding a statute which applied alike to all owners of land adjacent to a public improvement, the clear implication of the decision in *Eldridge v. Trevezant* is, that if the statute had put the non-resident owners of such lands on any different footing, that such statute would have violated the Fourteenth Amendment.

The privilege in question is not a mere civic privilege based upon local citizenship alone; if it were, it would have been conferred upon any citizen of Westport, and not be limited in each instance to the residents of the town, who own land fronting on the particular street proposed to be improved. It is perfectly plain that the Missouri courts understand and enforce the privilege as a right of property and not a mere right of citizenship. In a recent decision of the Kansas City Court of Appeals concerning this privilege of protest granted to residents in the same statutory provision governing Missouri cities of the third class, the court said:

"In cities of uneven surface, bringing a street to the

established grade is of very great importance since it has a decided effect on the value and convenience of property."

City of Kirksville, Mo., v. Coleman, 77 S. W. Rep., 120-122.

The vice of the statute in question is, that it divides the owners of lands fronting on a street authorized to be improved into two classes; resident owners and non-resident owners, and extends a protection of financial value to one class which it withholds from the other. All the owners of land abutting on a street or highway, constitute a class which is a natural one: Each owner has the same general interest in the value and use of the high-way to their lands, and the non-residents need protection against municipal abuses and indiscretion in street improvements, at least as much as resident owners. What stable reason can be offered which will justify the discriminating grant of such protection to the resident owner only? The non-resident is certainty equally interested in avoiding a street improvement which is a damage or inconvenience to his property, or which will not be a benefit equal to its cost. To withhold from the non-resident owner, the protection conferred upon the resident owner, as in the provision in section 95 of the state legislative act in question, is obviously a denial of the equal protection guaranteed in section 1 of the 14th Amendment to the Constitution of the United States.

Anderton v. Milwaukee, 82 Wis., 279;
Utsey v. Hyatt, 30 South Car. 360;
Saunder v. Benning, 38 Id., 502;
State v. Garbroski, 111 Iowa, 498;
Shirk v. City of Lafayette, 52 Fed. Rep., 857;
State v. Julow, 129 Mo., 176;
Roby, Trustee v. Smith, et al, 131 Ind., 342;
Sayre Boro v. Phillips, 148 Pa. St., 482;
Ellis v. Ry. Co., 165 U. S., 150;
Blake v. McClung, 172 U. S. 239;
Blake v. McClung, 2nd Appeal, 179 Id. 59;
The Stratton Claimants v. The Morris Claimants, 89 Tenn., 500.

Adverse Views Stated and Answered.

Buchan v. Roadwell, 88 Mo. 31, is relied on by the paving company as adverse to complainant's objection to the provision in section 95 of the state legislative Act in question. The entire decision on this point, is as follows (88 Mo. on page 36):

"There is nothing in the constitutional objection made that non-resident property owners are discriminated against by section 1, Article 8, of the charter, which provides that 'the common council on the petition of residents of Kansas City, who own a majority of front feet on a street to be graded, may order the same to be graded at the expense of the property owners'. When it is done the same rule of assessment applies to all the property whether owned by residents or non-residents. 2 Dill. on Mun. Corp., Secs. 752, 802. The legislature in the exercise of its paramount control of the state could have authorized the council to have ordered the grading of streets at the expense of property owners without any petition."

Complainant submits the following in answer to this decision of the Supreme Court of Missouri:

1. When, as here, the claim is made that a state statute violates a provision of the constitution of the United States, the Federal Supreme Court will form and declare its own independent judgment of the meaning and validity of such state statute, uncontrolled by the decision of any state court.

Yick Wo v. Hopkins, 118 U. S., 356;
Bush v. Kentucky, 107 U. S., 110;
Brennan v. Titusville, 153 U. S., 289;
Roberts v. Northern Pacific Ry., 158 U. S., 1-21;
McCullough v. Virginia, 172 U. S., 102;
Scott v. Neal, 154 U. S., 45.

2. Was the same point presented by the complainant actually decided by the Missouri Supreme Court? It is undoubtedly a true statement that "the same rule of assessment applies to all the property whether owned by residents or non-residents," but the objection here offered is not that

any inequality of assessment is authorized, between resident and non-resident owners of land assessed for an adjacent street improvement, but that the resident owners of lands adjacent to a proposed street improvement are authorized to protest against and prevent such public improvement being made at the cost of adjacent lands, while such privilege of protest and protection against an undesired and undesirable public improvement is withheld from the non-resident owners of such lands.

3. The other statement of the Missouri Supreme Court that, "the legislature in the exercise of its paramount control of the state could have authorized the council to have ordered the grading of streets at the expense of property owners without any petition," is also true, and this statement was likewise an evasion rather than a decision of the real question presented. It is not claimed but that the state legislature could authorize a street to be graded and paved by the city authorities, at the cost of adjacent lands, without conferring upon the owners of such lands any right of petition or protest, but the point here presented is that the legislature could not confer upon the residents, the means whereby they could protect their lands adjacent to a proposed street improvement from damage or inconvenience, or the cost of such street improvement, and withhold the same means of protection from the non-resident owner of such lands as in the state legislative act in question. In other words, as before contended for, and established by the authorities there cited on the same proposition, while the Missouri Legislature could have authorized cities of the fourth-class to make street improvements at the cost of adjacent lands without conferring upon the owners of such lands any right of petition or remonstrance, the means of preventing such improvements could not be conferred upon some of such owners and withheld from others of them, as in the Act in question, for this is a denial of the equal protection of the law. This statute is as arbitrary and objectionable, as if it had based the power of the municipality to order a street

pavement and assess the cost thereof against abutting lands upon a failure of protest of a majority of the owners of such lands on the east or north side of a street proposed to be paved.

A state legislature could authorize an attorney's fee to be taxed, in *all* civil suits in favor of the successful party, but it does not follow that it could authorize an attorney's fee to be taxed in civil cases in favor of a certain class of litigants, when the same privilege and protection was not extended to successful litigants in other civil cases.

Ellis v. Ry. Co. 165 U. S. 150.

A state legislature might require *all* employers of labor to pay their employes money for their labor, but a statute which requires manufacturing and mining corporations or firms to pay their employees for their labor with money and which forbids their payment with trade checks, without imposing the same regulations on other corporations and employers of labor is unconstitutional, because such a statute is a special law and denies an equal protection of the law.

State v. Loomis, 115 Mo. loc. cit. 319-320.
See also *State v. Julow*, 129 Mo. 164.

A state legislature could entirely exclude persons and corporations from doing a particular kind of business, but it cannot permit particular persons or a class of persons to follow such business and deny to others an equal privilege.

State ex rel. v. State Board of Ins. Commrs. 37 Fla. 575;
Cotting v. Kansas City Stock Yards, 183 U. S. 79, 108.

A state may authorize a city to change the grade of its streets and impose or withhold a liability for the damage to adjacent property resulting from such change of grade as done in this state previous to the constitution of 1875 (*Householder v. Kansas City*, 84 Mo. 492), but a state

legislature cannot, after imposing upon a city a liability for the damage resulting from the change of grade of any street therein, pass another law exempting the city from such liability for a change of grade of streets in a certain part of the same city, for this would be to deny to the owners of the lands in the particular district of the city the equal protection of the law and violate the 14th Amendment.

Anderton v. Milwaukee, 82 Wis. 279;
Eldridge v. Trezevant, 160 U. S. 452.

It is clear enough, that the provisions of section 95 of the Missouri Legislative Act, is a violation of the equal protection guaranteed by the 14th Amendment to the Constitution of the United States.

All of the sections of the Legislative Act in question authorizing street improvements at the cost of adjacent lands, fall with the void provision noted in section 95.

It is most manifest that the sections of the state legislative act in question were intended to operate and be effective as a whole and not in detached portions. To strike out only the provision of section 95 in question, and leave intact the other provisions in this legislative act, upon the subject of the special assessment of the cost of a street improvement against adjacent lands, would vest the board of aldermen with power to order and contract for a street improvement and charge and enforce the costs thereof to adjacent lands, unhampered and unhindered by the action of resident owners of such lands provided for in provision of section 95 in question, a power which the Missouri courts hold the legislature intended to withhold from the board of aldermen.

City of Kirksville, Mo., v. Coleman, 77 S. W. Rep., 121;
Forbis v. Bradbury, 58 Mo. App., 506;
Knoppi v. Roofing & Paving Co. 92 Mo. App., 279;
Brady & Kirby v. Rodgers, 63 Mo. App., 222;
City to use v. Eddy, 123 Mo. 558-9.
See also *Hoyt v City of East Saginaw*, 19 Mich. 39.

Therefore, none of the provisions of such legislative act, upon the subject of special assessment of the cost of street improvements to adjacent lands, can stand, but all thereof fall with the unconstitutional provision in section 95, as null and void.

Hoyt v. City of East Saginaw, *supra*, on page 44;
Virginia Coupon Cases, 114 U. S. 272, 304-5;
Sprague v. Thompson, 118 Id. 91, 94, 95;
Pollock v. Farmers Loan & Trust Co., 158 Id. 636;
Connolly v. Sewer Pipe Co.. 184 Id. 565;
Utsey v. Hiott, 30 South Car. 360;
State ex rel. v. Wardell, 153 Mo. 323;
Dexter v. Boston, 176 Mass. 247.

(This proposition is intended as also a reply to the contrary suggestion in the opinion of the trial judge filed in this case).

And the tax-bills in question are therefore null and void.

With the unconstitutional and void legislative provisions aforesaid, the municipal proceeding thereunder, including the tax-bills in question, necessarily fall, as null and void.

O'Brien v. Wheelock, 184 U. S. 450;
Daniels v. Tierney, 102 U. S. 419;
State ex rel v. St. L. & N. R. R. Co., 74 Mo. 163;
Dexter v. Boston, 176 Mass. 247;
State ex rel v. Wardell, 153 Mo. 319;
Brown v. City of Denver, 7 Colo. 305;
Anderson v. Hill, 54 Mich. 478;
Deitz v. City, 91 Wis. 422;
Ulman v. Mayor, 72 Md. 567;
Stuart v. Palmer, 74 N. Y. 183;
State v. Thomas, 138 Mo. 99.

No silence or inaction of complainant could give any validity to such void proceedings, or estop complainant from attacking or resisting the tax-bills.

"To constitute an estoppel by silence there must not only be an opportunity but an obligation to speak."

Wiser v. Lawler, 189 U. S. 260.

See also:

Batly v. City of Hastings, 63 Neb. 30-31;
Henshaw v. Bissell, 18 Wall, 271;
Filer v. United States, 9 Wall, 49.

Where objections, such as here made, go to the very ground work of the subject-matter, there is no principle of law on which any life or efficiency or right of action can be given to such void proceedings, and no mere silence or inaction of an owner of lands so illegally charged by such proceedings can be made the basis of an estoppel to attack or resist the tax-bills in question.

O'Brien v. Wheelock, 184 U. S. 450and other authorities last cited:

See also *Whitehead v. Arkansas etc. R.*, 28 Ark., 465;
Perkinson v. McGraff, 9 Mo. App., 26;
Keane v. Klausman, 21 Mo. App., 485;
Galbraith v. Newton, 20 Mo. App., 380;
City of St. Joseph v. Dillon, 61 Mo. App., 317;
State ex rel. v. St. L. & N. Ry. Co., 74 Mo., 163;
Verden v. St. Louis, 131 Mo., 98-9;
Wood v. Kansas City, 162 Mo., 389;
Hawthorne v. East Portland, 13 Oregon 282;
Smith v. Minto, 30 Oregon, 351;
Town of Clay City v. Bryson, Ind. Sp. Ct. 66 N. E. Rep., 498;
Steickert v. East Saginaw, 22 Mich., 111;
Winnebago F. & M. Co. v. Fon du Lac Co., 113 Wis., 72;
Mulligan v. Smith, 59 Cal., 234;
Keese v. Denver, 10 Colo., 122;
Batty v. City of Hastings, 63 Neb., 30-31.

And no promise to pay for the improvements will be implied in law or in equity because of any supposed or real benefit therefrom to the parties illegally assessed, as no fraud on the part of the complainant is alleged or shown.

Hedges v. Dixon County, 150 U. S., 182;
Berlin Iron Bridge Co. v. San Antonio, 62 Fed. Rep., 882;
Wheeler v. City of Poplar Bluff, 149 Mo., 36;
Hawthorne v. East Portland, 13 Oregon, 282.

Besides for work upon a public contract that is *ultra vires* and contrary to the law, or the policy of the law, the law will never imply a contract to pay.

Thomas v. Railroad Co., 101 U. S., 86.

Complainant not guilty of laches in not protesting to city authorities of Westport; nor in not seeking court injuntion to prevent the street pavements in question.

Defendant offered no testimony showing, or tending to show, that the complainant had any actual notice or information of the proposal of the board of aldermen to lay any of the street pavements in question, within the time prescribed in the Westport charter, resident owners of adjacent lands were authorized to protest against street improvements; the uncontradicted testimony of complainant is that he did protest to McGowan, defendant's agent, against the Main street pavement when he heard of it, and that he had no knowledge of the other two pavements until they were done or about done. (Pr. Rec. pages 198-199).

However, if the testimony showed, or had shown, that complainant had full and actual notice of the municipal proceedings as to each of the street pavements in question from the beginning to the end, and with such knowledge had failed to protest to the city authorities or the defendant Paving Company, and had failed to attempt to prevent any of such improvements by court procedure, the complainant could not legally, logically and justly be held culpable in

law or equity for the very simple and additional reason that any resistance or effort on complainant's part would have been in vain.

(1) Complainant was a non-resident of the city of Westport (Pr. Rec. pages 194-5). The Westport city authorities by construction and by practice have uniformly and rigidly confined the charter conferred right of protest against any improvement of its streets, at the expense of adjacent lands, to the resident owners of such lands (Pr. Rec. pages 73-168). "Non-residents did not count." (Pr. Rec. pages 435 and 440).

(2) No Federal court would have granted complainant an injunction to prevent the Westport board of aldermen enacting ordinances ordering the pavements.

New Orleans Water Works v. New Orleans, 164 U.S., 481;

McHord v. Louisville & Nashville Rd. Co., 183 U.S., 483.

(3) In view of the ruling of the Supreme Court of the state in *Buchan v. Broadwell*, 88 Mo., 31, no state court would have granted an injunction on the ground that the Westport charter provision in question was unconstitutional.

(4) And as the proceedings for the pavements in question were not had contemporaneously but successively, complainant could not have gone into the Federal Circuit court and stopped them, as the cost of no one of such pavements, liable to be assessed against complainant's adjacent lands, (as proven by the tax-bills issued therefor,) exceeded the sum of two thousand dollars.

Wheless v. St. Louis, 180 U. S., 379.

The gross amount of the special tax-bills issued against complainant's land for the three pavements, respectively, in question, will be found alleged in the bill (Pr. Rec. pages 2 and 3) and answer (pages 8 and 9).

The foregoing observations on Laches and Estoppel, have been added as a reply to the suggestion contained in the trial judge's opinion filed in this case to the effect, that the complainant did not protest against these improvements and therefore ought not to be allowed to question the constitutionality of the charter of the city of Westport by reason of the provision in section 95.

No laches in filing bill in equity in this case.

The special tax-bills in question purport to have been issued in October and November, 1897, (pages 2-3-8 and 9). Complainant's bill in equity to cancel them, was filed January 4th, 1900, (page 1). From about the date of such issue to within a day or two of the filing of such suit negotiations for their compromise were pending between agents of the defendant Paving Company and complainant. (Page 78) In these circumstances there is no ground for any claim of laches on the part of complainant in filing this suit.

Turner v. Johnson, 95 Mo., 447-448.

Besides there is no ground for any claim of laches on the part of complainant in ~~the~~ bringing ~~of~~ this suit sooner, when there is neither a showing nor pretence of any loss or prejudice thereby to defendant Paving Company.

Pacific R.R. Co. v. Atlantic R.R. Co., 20 Fed. Rep., 277;
Hanchett v. Blair, 100 Fed. Rep., 817;
Menendez v. Holt, 128 U. S., 523;
Spalding v. St. Joseph's Industrial School, 107 Ky., 400.

II.

The special tax-bills in question are void, because the required preliminary resolution of necessity for the pavement, adopted by the board of aldermen in each case, declares that the pavement should be made of "genuine Trinidad Lake Asphalt," and thus tied the hands of the Board of Aldermen and Mayor at the outset so that the ordinance and contract coming on later, could not provide for or permit the doing of the work with asphalt from elsewhere.

See section 95 Westport charter page 26 *ante*.
See "Tenth" charge of bill page 6 *ante* (Pr. Rec. p. 5)

"Amendment to Tenth charge" of the bill page 6 *ante* (Pr. Rec. p. 22).

See resolutions in question, pages 28-29 *ante* (Pr. Rec. pages 121-147-171).

See complainant's assignment of errors, No. 24 and No. 25 (Pr. Rec. 30).

The contents of the respective resolutions, adopted by the board of aldermen for the pavements in question, were in substance the same, to-wit:

First. Each of the resolutions contained the required declaration that the pavement "was necessary to be done."

Second. Such declaration was followed by the following words in each resolution: "The pavement shall consist of *a genuine* Trinidad Lake Asphalt pavement; the base to consist of," etc., (here follows a description of the other materials and manner of the work, to-wit: the foundation of stone, the binder course of concrete and the wearing surface, the matrix of which was required to be composed of genuine Trinidad Lake Asphalt). *Ante page* 28.

The authority for a resolution of the board of aldermen of Westport for a street improvement, is in Sec. 95 of the State Legislative Act quoted *ante* page 26. A resolution for a street improvement is not elsewhere mentioned. For convenient view thereof this section is here reprinted:

"Section 95. When the board of aldermen shall deem it necessary to pave, macadamize gutter, curb (when curbing is set out in the street beyond the sidewalk) or otherwise improve any street, avenue, alley or other highway, or any part thereof, within the limits of the city, for which a special tax is to be levied as herein provided, *the board of aldermen shall, by resolution, declare such work or improvement necessary to be done*, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks; and if a majority of the resident owners of the property liability to taxation therefor shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such

improvements, then the board of aldermen shall have power to cause such improvements to be made, aud to contract therefor, and to levy the tax as herein provided."

A prior section (85), *ante* page 23, required the ordinance which was to be subsequently passed, to describe the materials to be used in the work and if such materials are not prescribed by ordinance the tax-bills are void. (*State to use v. Eddy*, 123 Mo. 558-9).

It will be observed that the resolution was required to be published for two consecutive weeks, and if no protest is made within ten days after the last publication, then the city board of aldermen had authority to cause the improvement to be made, by passing an ordinance ordering the work and authorizing the contract (Section 95, quoted *supra*).

The only thing required to be published in the whole proceeding was this preliminary resolution declaring the necessity for the work. This resolution under the law was intended to perform a double function, (a) to notify the resident property owners that the work was to be done, and (b) also to notify builders of pavements of the kind contemplated by the resolution so that they might take all lawful means to inform the city authorities of the advantages to the city and the property owners, in point of price, quality, etc., which they could offer, *before* the passage of the final ordinance, describing the material and authorizing the contract for the work.

Although the law did not by express provision require the work to be let to the lowest bidder, it certainly did not contemplate that this preliminary resolution should, under cover of describing the materials of which the work should be constructed, so tie the hands of the board of aldermen and mayor that, when they come to enact the final ordinance and contract for the work, they would be compelled to so describe materials that the work could be done only by a certain person and with his materials to the exclusion of all other persons in the business, although they might do as good work and furnish the same material for a less price. Yet

such was the effect of the language in this preliminary resolution limiting the asphalt to be used in the pavement to Trinidad Lake Asphalt.

Partridge v. Luear, 99 Calif. 519;
Piedmount Paving Co. v. Allman, 136 Calif. 88;
King-Hill Brick Mfg. Co. v. Hamilton, 51 Mo. App., 120;
City of Atlanta v. Stein, 111 Ga. 792.

And thus all opportunity for the city or the property owners to have the benefit of competition at any time or stage of the proceedings was destroyed; whereas, by the requirement that the preliminary resolution should be published, the law contemplated that they should at least have the benefit and advantage of the competition which that publication would naturally create, among the builders of asphalt pavements, before passing the final ordinance describing the materials and authorizing the letting of the contract for the work.

City of Atlanta v. Stein, 111 GA., 789, IS POINTEDLY APT ON THIS PROPOSITION—*Syllabus:*

"A municipal corporation, although not required by its charter to let contracts for public works to the lowest bidder, and although clothed as to such power with the broadest discretionary power, had no authority to adopt an ordinance prescribing that all work of a designated kind shall be given exclusively to persons of a designated class."

Extract from Opinion of the Court.

"The vice of the ordinance now under consideration is that it cuts off the power to fully and freely exercise that very discretion which the public good requires the mayor and general council to exercise in making contracts. It effectually ties their hands and prevents their availing themselves of opportunities to make advantageous agreements in behalf of the city, which, it is idle to say, would not be prevented were this ordinance out of the way. We cannot, therefore, escape the conclusion that in adopting the ordi-

nance the mayor and general council exceeded their authority." (111 Ga., on page 792).

See also *Freeport Water Co. v. Freeport City*, 180 U. S. 588-600.

In the Georgia case it was a preliminary ordinance rather than a preliminary resolution thus vicious. It certainly needs no elaboration to apply the same arguments to the preliminary resolution for the pavements in question. These resolutions specifying "Trinidad Lake Asphalt" as the asphalt to be used in proposed street pavements, so tied the hands of the board of aldermen that they could not, in ordering or letting the work thereafter, provide differently in the ordinance or contract and thus have any competition for the work, without violating these provisions of the resolutions. As the natural consequence of the resolution, from its specifying and requiring the named materials was to prevent the board of aldermen from having or exercising any independence, judgment or freedom as to the materials for the pavement, when it came to the passage of the ordinance ordering the work and letting the contract therefor, such a consequence must be presumed as intended by the board of aldermen in the resolution, under the familiar presumption that everyone is presumed to intend the natural consequence of his own act. Minnesota v Barber 136 U.S.

Lawson on Presumptive Evidence, page 262.

Moreover, the facts and circumstances, *aliunde* the preliminary resolution in question, stated and cited in Sections "K" and "L" *ante*, pages 34 to 48, show conclusively that the only purpose of the "Trinidad Lake Asphalt" specification in these resolutions was to clinch the same specification in the ordinance ordering the work and ultimately the job for the defendant.

Furthermore, nnder the provisions of the law, the preliminary resolution, was only authorized to declare "such work or improvement necessary to be done." It is true that the resolution might declare it necessary to pave a street with asphalt or vitrified brick or any kind of stone,

as a part of the description of the work (see section 94 *ante* page 26, *City of Kirksville, Mo., v. Coleman*, 77 S. W. Rep., 120.) Because such declaration would not necessarily be false. But the law did not authorize a declaration which could not be true. For instance, the board of aldermen could not declare it necessary to pave a street with gold or silver or precious stones, for the plain reason that there could be no such necessity.

The same reason denies the right of the board of aldermen to declare in this resolution, that it was *necessary* to pave these streets with *Trinidad Lake* Asphalt. There could be no *necessity* for restricting the asphalt to *Trinidad Lake* Asphalt.

It may have been necessary to have an asphalt pavement, or a brick pavement, or a stone pavement, but to declare that it was *necessary* to have the asphalt come from Trinidad Lake, or Bermuda, or California, or the brick from Galesburg, Ills., or Pittsburg, Kansas, or Kansas City, Mo., or the stone from Medina, N. Y., or Cottenwood Falls, Kansas, or Carthage, Mo., or any other particular place would be necessarily false, when the evidence showed that there would be no substantial difference in the pavement no matter if the asphalt, or brick, or stone came from another place. In the case at bar the declaration of a necessity for a Trinidad Lake Asphalt pavement contained in this resolution is false and impossible on its face, because the proof shows and the court will take judicial notice of the process of preparing asphaltum for paving purposes, and can therefore see that the place where the asphalt comes from originally is wholly immaterial and has nothing whatever to do with the quality of the manufactured or prepared article which alone is used in making pavements. The resolution therefore, insofar as it declared it necessary to pave the streets with *Trinidad Lake* Asphalt, was false, arbitrary and capricious on its face and in fact, and was therefore illegal and void. Indeed, under the facts and circumstances shown by the evidence, (stated and cited

in "Section K" and "Section L") the resolution for each of the pavements amounted to a declaration that it was necessary that the pavement be laid by a certain contractor, to-wit: the defendant, which had a monopoly of Trinidad Lake Asphalt—a still wider departure from the law and the truth—a still more arbitrary and unwarranted declaration. In fact the resolution of necessity does not declare that it is necessary to pave the street with asphalt, but says in effect, that it is not necessary to pave it at all or with any kind of asphalt unless Trinidad Lake Asphalt is used. A valid resolution was a necessary jurisdictional step, to the validity of the subsequent ordinance and tax-bills and without which the whole proceedings were void.

City to use v. Eddy, 123 Mo. 546;
Hoyt v. East Saginaw, 19 Mich. 59;
McLauren v. Grand Forks, 6 Dakota, 397.

III.

The "Trinidad Lake Asphalt" specification in the resolutions and ordinances for the pavements make a monopoly of an article of interstate and foreign commerce, and cannot be saved from illegality and nullity under cloak of a municipal liberty of judgment and action upon the subject.

This point is intended to elucidate the several points of this brief on the "Trinidad Lake Asphalt" specification, and to sweep away the dust which will be thrown thereon, rather than as a single point.

1. No sort of legal excuse is given or exists for the "Trinidad Asphalt" specification. It is not pretended by any testimony that "Trinidad Lake Asphalt" contains any useful property for paving purposes not in the asphalt of numerous other places. The specifications for the pavements in question call for "Refined Trinidad Lake Asphaltum," *ante* page 31 (Pr. Rec. 128, 154, 177).

This requirement of "refined Trinidad Lake Asphaltum" undisputably implies that there are foreign substances to be taken out of the crude asphalt from the Trinidad Lake to obtain and utilize the paving properties therein. The undisputed testimony in the case also shows that this and all other asphalt has to be refined before it is fit for use in street paving; also that when refined the paving properties thereof are the same, no matter whence it comes; also that asphalt abounds extensively in the United States and universally in tropical countries, and that the asphalt of places other than the Trinidad Lake Asphalt was well known and in general use for street paving in many of the cities of the United States, at and before the orders and contracts for the pavements in question (Pr. Rec. pages 463 to 466, also pages 423-4).

The same facts also appear in the dictionaries and encyclopedias, but more at length and more in detail in numerous text books and official reports, etc., in the library of Congress at Washington, some of which are the following:

Asphaltum, by Edward Parker, in United States Geological Survey, 18th Annual Report, Pt. 5, pp. 919, 948. Washington, 1897, 4°.

Asphaltum, by Edward W. Parker, U. S. Geo. Survey; 19th Annual Rep., Pt. VI., pp. 187-204.

Asphaltum and Bituminous Rock, by Edward Parker, U. S. Geo. Survey, 20th Annual Report, Pt. VI, (cont) pp. 251-268. Washington, 1899, 4°.

Same Report in Vol, 6 of Annual Reports of Interior Dept., 1899, p. 251.

U. S. Geo. Survey, House Documents, Vol. 50, p. 653; Vol. 17, Mineral Resources, 1900, p. 653.

U. S. Geo. Survey, 21st Annual Report, Pt. VI. pp. 319-332. Washington, 1901, 4°.

Byrne on Highway Construction (3rd Ed.), pages 38 to 61.

Id, page 161. Id. page 50, sec. 99a

Asphalts and Bitumens, by Samuel D. Sudtler, Ph. D., Journal of the Franklin Institute, Vol. 140, page 198.

15 Journal of the Society of Chemical Industry, 871-875

17 Id. 1006

1-3 American Asphalt Journal, Aug. 1901 - July 1903.

This court will take judicial notice of the facts stated in these references; also of the asphalt in the many other places besides the Island of Trinidad, just as it would take notice of the existence and abundance of limerock, minerals, wheat and other well known products of the world, and the use of the same.

Higgins v. ~~Lyon~~ Lime, 130 Mass. 3;
Phillips v. Detroit, 111 U. S. 606;
Brown v. Spellman, 155 U. S. 670;
Grimes v. Eddy, 126 Mo. 180, and cases cited.

A short study of the literature cited on the subject more than verifies the testimony taken that the crude asphalt from every place in the world must be refined and the paving properties separated and extracted from the other matter therein before it can be used in street paving. None of these asphalts will illustrate the idea better than the "Trinidad Lake Asphalt." Thus we find the crude pitch asphalt of the Trinidad Lake analyzed as follows: Water, 28.50; ash, 25.40; *bitumen*, 39.10; original matter not in Sol., 6.90.

See "The Asphalt and Bituminous Rock Deposits of the United States," by Geo. H. Eldredge in U. S. Geological Survey, 22d Annual Report, Part 1, p. 224.

The paving properties, and all of them, are in the bitumen. The bitumen consists of asphaltene and petrolene (asphalt and petroleum).

See top of page 224 of last citation. See also Byrne on Highway Construction, (3rd Ed.), 38.

The difference in the refined asphalts from the various places is only in the ratio of asphaltene and petrolene in the bitumen. In few places only of the world is asphaltene and petrolene of the bitumen in proper proportions for street paving purposes. A table prepared by A. S. Cooper, civil engineer, in his article on "Asphaltic Cement," Sept. 15th, 1899, Vol. 38, Scientific American Supplement, p. 15597, states the proportion of petrolene and asphaltene in the bi-

tumen taken from the asphalt in various places of the world, as follows:

NAME OF ASPHALT.	BITUMEN.	
	Petrolene, soluble in ether	Asphaltene, unsoluble in ether
Bechelbrown	85	15
Jew pitch, Dead Sea	75	25
Cexitambo	5	95
Syrian	48	52
Lake, best, Trinidad	70	30
Lake, average, Trinidad	63	47
Soil, Trinidad	47	53
Chocolate pitch, Trinidad	49	51
Iron pitch, Trinidad	64	46
Asfalto, California	52	48
Glance pitch, California	7	93
Bitumenized sand, California	93	7
Bitumenized Argil, California	80	20

Then comes the following statement:

"As far as experiments have progressed, 80 to 85 per cent of petrolene and 15 to 20 per cent of asphaltene would be the proper proportion for cement for street pavements employed *in combination with sand and limestone.*" *

The conspicuous fact proven by this table of scientific learning is that the bitumen extracted from the crude asphalt of nearly all places is not in proper proportion for paving mixture. In most of it the petrolene is deficient in quantity; in some, it is the asphaltene that must be supplemented. The bitumen from "Trinidad Lake Asphalt" needs to be supplemented with over 100 per cent of petrolene to make it in proper proportion and fit for use in combination with sand and limestone for street pavements. It is manifest, however, that the bitumen from various places in the world may with facility be brought into proportion and made fit for street pavement; for example, petrolene from the oil of Texas, California or any place in the world

*Mr. Cooper had written a previous article upon "The Genesis of Petroleum and Asphalt in California," Vol. 36, Scientific American Supplement, p. 14738.

may be and is used to supplement the bitumen of the "Trinidad Lake Asphalt," or other asphalt, to make a proper mixture for a street pavement, or where the petrolene of the bitumen extracted from any crude asphalt is in excess of proportion to the asphaltene, the asphaltene is brought into proper proportion and the bitumen made fit for use in combination with sand and limestone for street pavements by adding the like paving substance from any other place. (See also article 74, Engineering and Mining Journal, page 782 3rd column). From these facts it is made clear that any and all claim that "Trinidad Lake Asphalt" *per se* possesses any distinct paving property that is not possessed and cannot be supplied in any other asphalt is altogether groundless and arbitrary.

It is thus made clear that a liberty of judgment and discretion of the board of aldermen to select asphalt, according to place, is not necessary to secure a good or the best asphalt pavement, nor necessary to the exercise of a sound discretion or proper action upon the subject. To uphold the state or municipal legislative enactment making a discrimination as between places of asphalt merely because the bitumen of one contains a greater amount of one paving property or a less amount of another paving property than the bitumen from the crude asphalt of another place, would sustain a legislative distinction as to flour from wheat, which produced more flour than bran and *vice versa*.

The pavements are not, as the resolutions and ordinances on superficial reading imply, asphalt pavements. There is really no such thing as an asphalt pavement. The asphalt used in a street pavement is a small percentage of the materials therein. Its part and use in the construction of a pavement is only as a cement to bind and hold together and form into a sort of concrete the broken stone and sand which are the main ingredients of the pavement. (See specifications for the pavements, page 31 *ante*).

It will possibly give the court a more perfect assurance of this statement to read the report of Mr. A. W. Dow,

inspector of asphalts and cements, District of Columbia, on "Some Points on the Theory and Practice of Asphalt Mixtures."

U. S. 55th Congress, 3rd session—Senate Document No. 38, on Municipal Matters of the District of Columbia, page 50-80. Especial attention is called to the following words of Mr. Dow in this report:

"I do not propose here to explain the cause of any particular failure or to tell you directly how to avoid failures, but merely to present in as practical a way as possible the influence the selection of different ingredients has on the character of pavements on which they are used, and to discuss the theory of the *cementing property of asphalts.* In this way the cause of some of the failures will be made self-evident and why poor pavements are often made with good asphalts. * * * Id. page 50. The problem now to deal with is the selection of the sand. What sand which can be practically handled can be used with the softest possible asphalt cement and yet make a desirable pavement, that is one that will not shove or mark too much under the traffic of the particular street upon which it is to be laid, on the hottest day. Such a mixture as will be able to resist the cold. * * * Id page 51. The great difference in pavements, due to the use of different sands, is not appreciated by many. It is not merely a theoretical difference, to be put aside as too trivial to be considered in practical work, for there is nothing responsible for more failures than the use of the wrong sand. * * * Id page 52. As sand is 90 per cent of the pavement why should it not be the most important ingredient to consider; and when a pavement is a failure why should it not be more responsible than the asphalt, which now bears the brunt of all failures" Id. page 53.

If the board of aldermen of Westport could pass by and exclude the like asphalt of California, Utah, Mexico, Cuba and Venezuela and specify "Trinidad Lake Asphalt" it necessarily follows that they could pass by and exclude all of the sand on the banks and islands of the rivers of Missouri, Kansas and Colorado and require the sand from any coast or island of the seas, for a street pavement in the city of Westport.

2. The whole argument made in favor of the right of the city to specify "Trinidad Lake Asphalt" for the pavements is, that the city, in paving its streets, had the same liberty to prescribe the materials and the place of origin of such materials, for such pavement, as an individual has in the erection of improvements at his own expense. This premise as to the pavements in question is false from almost every point of view. There is no plane of equality on which a public corporation in its legislative capacity, can be put or stand with an individual acting in his own right.

Taylor v. Carondalet, 22 Mo., 110-111;

Municipal corporations are agents of limited authority and are in no sense principals. In ordering street improvements and assessing abutting lands therefor, they are agents or trustees of the public and of the owners of such abutting lands and nothing else.

The Mayor etc. v. Reynolds, 20 Md., 1;
McQuiddy v. Brannock, 70 Mo. App., 535.

The only individuals a board of aldermen could be judged on a plane with, would be individuals who were mere agents and whose acts could be opened to the core, whenever brought in question in any court of law or equity. No more than a private agent can a public officer be deemed to have capricious, arbitrary or oppressive authority.

"A discretion delegated to an officer is a sound, legal discretion the meaning of which is well known and understood in the law, and is not an unlimited license to the officer to act and do as he pleases irrespective of restraint."

State ex rel. v. LaFayette Co., 41 Mo., 226;
See also *People ex rel. Coughlin v. Gleason*, 121 N.Y. 631-635:
Inge v. Board of Public Works, 33 Southern Rep., 681.

In the case of *Adams v. Brennan et al*, 177 Ill., 194, the Supreme Court of Illinois held void a contract of a school

board for the construction of a public school because it provided that the work should be done by union labor only. The ground of the court's decision was that, to hold otherwise would be to recognize a power in the school board that the legislature of the State of Illinois could not have in terms conferred upon such board. It was claimed *in that case*, that as an individual would be authorized to put that clause in a contract with the builder of improvements on his property; that the public must be construed to have the same authority, in reply to which the court said:

"Nor can the fact, if it be a fact, that an individual might make such a bargain, authorize these public officers exercising a public trust to do so. The individual may, if he chooses, give away his money; but the public officer, acting as a trustee, has no such liberty, and no right to surrender to a committee, or anyone else, the rights of those for whom he acts." (177 Ills., on page 201).

The aldermen of a city are agents in a dual sense: They are leglislative agents in prescribing rules of action, for the exercise of ministerial functions of the city, and for the government of third parties and the public generally. They are administrative agents of the city in the business matters of the city; that is, matters of private and individual concern to the city.

Walla Walla City v. Walla Walla Waterworks, 172 U. S., 8;
Pikes Peak Co. v. City of Colorado Springs, 105 Fed., 2-11;
Little Falls Electric Co. v. City, 102 Fed. Rep., 663;
State ex rel. v. Rodgers, 107 Ala., 456.

Viewed as legislative acts the resolutions and ordinances of a municipal body are ordinarily immune from defeat or attack for the extraneous matters which lead to their enactment.

Soon Hing v. Crowley, 113 U. S., 704;
New Orleans Waterworks v. New Orleans, 164 U. S., 471;
Albright v. Fisher, 164 Mo., 64.

However, the federal courts will, if necessary to know the meaning thereof, look back of a state statute or city ordinance and see what is behind or beside the mere words thereof, when the attack made thereon is that such statute or city ordinance violates the federal constitution. Sometimes by looking at proofs offered on the subject; at other times by taking judicial notice of whatever may be generally known on the subject.

Smith v. Lowe, 121 Fed. Rep., 753;
Ahkow v. Nunan, 5 Sawyer, U. S. Ct., 553;
Ex parte Keifer, 40 Fed. Rep., 401;
Yick Wo v. Hopkins, 118 U. S., 356 and on page 373;
Smith v. Ames, 169 U. S., 467, 524, 525 and 526 and cases cited;
Ex parte Hansen, 28 Fed. Rep., 129;
R. R. & Telephone cases v. Board of Eq., 85 Fed. Rep., 303, 318;
See also *Fishburn v. City of Chicago*, 171 Ill., 338;
State v. Santee, 111 Iowa, 1;
Cooley's Const. Lim. (6th Ed.) page 125, note No. 3;
Higgins v. Lime, 130 Mass., 3.

Viewed as administrative acts, the resolutions and ordinances are necessarily like the acts of any agent, open to attack and defeat for any perfidy or other illegal action, or even for lack of authority of the agent, and the enquiry in such case is not confined to what appears upon the face thereof.

Weston v. City of Syracuse, 158 N. Y., 275;
State ex rel. v. Cincinnati Gas Light & Coke Co., 18 Ohio State, 264-301-302;
Oakland v. Carpentier, 13 Calif., 540;
State ex rel. v. Rogers, supra;
Little Falls Electric Co., v. City, supra;
Pikes Peak Power Co. v. City of Colorado Springs, supra;
Ogden v. City of Armstrong, 168 U. S., 224-239;

Walla Walla City v. Walla Walla Waterworks Co., *supra*;
Fishburn v. Chicago, 171 Ill., 343;
San Antonio Gas Co. v. State, 54 S. W. Rep., 289;
Dillon Municipal Corporation, 4th Ed., Sec. 908-914;
Beach on Public Corporations, Sec. 773.

In the succeeding points of this brief complainant attacks the ordinances ordering the pavements as legislative acts because of the "Trinidad Lake Asphalt" specification therein.

If these ordinances are legislative acts they will stand and be judged upon the same footing and be held to the same degree of responsibility and conformity to the constitution as a state legislative enactment. If they are administrative acts they are subject to attack not only for what appears upon the face thereof but for the abuse of discretion and other unauthorized action of the board of aldermen in enacting such ordinances not appearing upon the face of the proceedings; as administrative acts no part of the history of their enactment is covered up by any fiction or by any conclusive presumption in favor of their validity. In the law of principal and agent there is no *Blue-beard* chamber.

By no true reasoning can these ordinances be upheld or shielded as legislative acts by any argument that would not uphold a statute of the state in like words. And by no true reasoning can these ordinances, as administrative acts, be upheld or shielded from the real history of their enactment, by any fictitious presumption applicable to a legislative act.

If these ordinances stand forth purged of the extraneous, pernicious influences by which their enactment was procured by defendant's agents, it is because and only because they are legislative acts in the same sense as state legislative enactments and subject to the same test of conformity to the constitution. If, on the other hand, they are administrative acts then these paving ordinances are begrimed with the lobbying, undue influence and conspiracy of the defendant's agents

with the board of aldermen of Westport whereby their enactmentwas procured and whereby they are vitiated.

Conn. Mut. Life Ins. Co. v. Hilman, 188 U. S., 219.

To paraphrase a figure of the Missouri Supreme Court to the same effect (164 Mo., 65), this high court will certainly not permit the defendant to make these paving ordinances fish to escape the commerce clause of the Constitution of the United States, and then to make them fowl to escape the anti-trust act of Congress and the law of principal and agent.

It is, in any event, one of the established rules of this court, that it will not permit a right secured by a federal law to be defeated by a municipal ordinance on any mere doubt as to whether such ordinance shall be classified as a legislative or administrative act.

Walla Walla City v. Walla Walla Waterworks, 172 U. S., 8;
Yick Wo v. Hopkins, 118 U. S., 356.

3. It is not comprehensible how, in the matter of street paving chargeable to abutting lands, the city of Westport could be put on the same plane as an individual improving his own property. The city has nothing to do with purchasing or furnishing materials for such street improvement, and is in no wise obligated or chargeable therewith.

In such case the city charter contemplated that the work should be let out by contract to a third party; that the contractor to whom the work is let should buy, pay for and furnish all materials for the street improvement, that he be paid for the improvement, not out of public funds, but in special tax-bills against the abutting lands (Sec. 85 to 95 Incl., page 23, *ante*).

It was the prerogative of the board of aldermen to order the street improvements and to prescribe the materials therefor, in the resolutions and ordinances (Sec. 85 and Sec. 95).

City of Kirksville, Mo. v, Coleman, 77 S.W. Rep., 120;
City to use v. Eddy, 123 Mo., 563 (Par. III);

And the Missouri courts hold that the board of aldermen acts in its legislative capacity in prescribing the kind of materials for a proposed street pavement.

Rich Hill v. Donnan, 82 Mo. App., 386;
King Hill Mfg. Co. v. Hamilton, 51 Id., 120;
St. Joseph v. Wilshire, 47 Mo. App., 125.

These resolutions and ordinances go further. They require the contractor to get the asphalt for the pavements from a particular place. They do not leave the contractor any liberty to buy or supply and use the like material coming from elsewhere.

Partridge v. Lucas, 99 Calif., 519;
Piedmont Paving Co. v. Allman, 136 Calif., 88;
King Hill Brick Mfg. Co. v. Hamilton, 51 Mo. App., 120;
Taylor v. Carondalet, 22 Mo., 110-111.

They, therefore, deprive the contractor of a right given to him by the commerce clause of the Constitution of the United States.

Minnesota v. Barber, 136 U. S., 313;
In point, *State ex rel Treat v. Coler*, 166 N. Y., 144.

No rational view of the city charter of Westport furnishes any justification for holding that the board of aldermen of Westport are, or should be, invested with any discretion to interfere with the contractor as to the place from whence materials for street pavement should come. The liberty to buy where and from whom he pleased, the materials prescribed for a street pavement would seem to be one of the just and legal rights of the contractor. The public welfare is also promoted by his having and exercising such liberty, unfettered by any municipal rule or regulation. The only matter of proper concern to the municipality is that the contractor use the kind of material prescribed. It is no proper concern of the municipality whence the material may come.

The liberty of contract is one of the liberties protected in the guarantee of "due process of law." The ordinances for the pavements deprive the contractor of the liberty to buy and procure the like asphalt substance from any place in the world except from Trinidad Lake, and therefore violate the constitutional guarantee aforesaid and are void.

State v. Loomis, 115 Mo., 316;
Glover v. The People, 201 Ills., 549;
Adams v. Brennan, 177 Ills., 194.
Street v. Varney Electrical Supp. Co., (Ind. Sup. Ct.) 66 N. E. Rep., 895;
People ex rel Treat v. Coler, 166 N. Y., 144;
People v. Orange County Road Const. Co., 175 N. Y., 84;
People v. Gilson, 109 N. Y. 389;
People v. Hawkins, 157 N. Y. 1.

4. If the city of Westport constructed street pavements on its own account in its individual and proprietary capacity where it had to procure the materials for the improvement, or was in any wise obligated or chargeable therewith, (which is not this case) then it might be said with some semblance of reason that the city could buy the material from where and from whom it pleased. (*People v. Orange Co. Road Const. Co.*, 175 N. Y., 84). This very liberty of discretion though would carry with it the right and duty of the city to keep such liberty of action to the last moment practicable. This discretion furnishes no argument to sustain a city ordinance which unnecessarily prescribed the place whence such material should come or a particular person from whom the material should be purchased, for such an ordinance would cut off any and all such discretion of the administrative officers of the city to make such purchase elsewhere or otherwise. The difference in the first and second instance is obvious. In the first instance the liberty of municipal action is preserved. In the second it is abdicated and surrendered. The case of the city of *Atlanta v. Stein*,

111 Ga., 789, is instructive and conclusive reasoning on this proposition. That case involved the validity of an ordinance of the city of Atlanta which required all of the printing of the city to be done by a union printing office. It was claimed that the ordinance was valid, first, because there was no limitation in the charter of the city of Atlanta requiring work to be let to the lowest and best bidder. Second, because of the discretion of the city to contract as it pleased on the subject. The Supreme Court of Georgia, condemning this ordinance and holding it void, said:

"The vice of the ordinance now under consideration is that it cuts off the power to fully and freely exercise that very discretion which the public good requires the mayor and general council to exercise in making contracts. It effectually ties their hands and prevents their availing themselves of the opportunity to make advantageous agreements in behalf of the city, which it is idle to say would not be prevented were this ordinance out of the way."

The same thing is essentially true when in advance of contracting for an asphalt street pavement the board of aldermen determined and prescribed in the resolutions and ordinances that the asphalt to be used therein shall be limited to genuine Trinidad Lake Asphalt. It was equivalent to the mayor and board of aldermen saying to the city engineer and paving contractors: The contract is for such and for only such as have or can and will get "genuine Trinidad Lake Asphalt" and that the city will have no commerce with the asphalt of any other place or with contractors who may have, or may get the same kind of asphalt from any other place for the proposed street pavement.

The State of Missouri is a large purchaser of flour, wheat, etc , to supply the inmates of its penitentiary, almshouses, etc. Large appropriations are made at each session of the legislature of the public funds for such purposes. It is doubtless true that the warden of the penitentiary or other officer charged with the duty of supplying food to the inmates of the prison would have the discretion of buying in

good faith from where and from whom he pleased, such food. He might buy all the flour at the Jefferson City mill; the meat at the packing house of the St. Louis Packing Co.; coffee from Mexico; sugar from Cuba. This exercise of administrative discretion, however, would not sustain a legislative enactment which required these purchases to be made at the same places. The obvious difference between the exercise of the two state powers is this: While the warden may have uniformly purchased from the same place named in the state legislative Act he was not bound at any time to continue the purchases at these places, but was at liberty to purchase the flour elsewhere, the meat elsewhere, the coffee elsewhere, the sugar elsewhere, whenever in his discretion he saw fit to do so, and therefore the state was not regulating or interfering with interstate or foreign commerce in such administrative action, but upon the legislature enacting that these state purchases must be made from the particular person, or from the particular places; this would leave no discretion or liberty upon the subject in the state administrative officers making such purchases. Such legislative Act would, by its necessary operation, exclude any commerce, between all states and countries other than those named in the act for such state supplies, and would therefore violate the laws of interstate and foreign commerce of the United States. To hold otherwise, is to hold that the commerce clause of the Constitution of the United States does not apply to state and municipal commerce with other states and countries, which obviously is not true.

People ex rel Treat v. Coler, 166 N. Y., 144;
People v. Hawkins, 157 N. Y., 1;
Arnold v. Yanders, 56 Ohio St., 417.

5. This court has never felt it safe to concede or admit that state or municipal authorities had or could have any judgment, discretion or liberty to make any discretionary rule in interstate or foreign commerce. The utmost that has been permitted to a state or city has been to make pro-

vision for quarantine against diseased persons or animals, or against any kind of danger from explosives, or the like, and such matters as come within the well-defined scope of police power, and even as to these matters the federal courts have been vigilant and strict in denying state or municipal authorities any power that might hinder, obstruct or interfere with interstate or foreign commerce.

In speaking of some of the state authorities, apparently to the contrary, this court said:

"The inquiry they have said was for the legislature and not for the courts. *With this we cannot concur.* The police power of the state cannot obstruct foreign commerce or interstate commerce *beyond the necessity for its exercise*, and under color of it, *objects, not within its scope cannot be secured* at the expense of the protection afforded by the federal constitution. And as its range sometimes comes very near to the field committed by the constitution to Congress it is the duty of the courts *to guard vigilantly against any needless intrusion.*" *R. R. Co. v. Husen*, 95 U. S., 473-474.

In the case of *In re Davenport*, 102 Fed. Rep., on page 543, the court said, citing the above case for the proposition:

"Necessity is declared to be the limit of the power of a state in the enactment of laws of this nature. That is to say, mere rules of convenience which interfere with traffic between states *and which are not necessary as means of self defense, are void*, because they enter within the domain of the power committed by the national constitution to the national government."

In *Crutcher v. Kentucky*, 141 U. S. 59-60, this court observed:

"It does not follow that everything which the legislature of the state may deem essential for the good of society and the well-being of its citizens, can be set up against the exclusive power of congress to regulate the operations of foreign and interstate commerce."

See also *Bowman v. Chicago*, 125 U. S., 490.

"Under the rule that the police power of a state cannot obstruct interstate commerce beyond the necessity for its exercise, state officers cannot accomplish under the protection of a valid law, results which the state is forbidden to accomplish by legislation." *Smith v. Low*, 121 Fed. Rep., 753.

6. The supreme and entire power over foreign and interstate commerce is vested in the Congress of the United States and the states have no concurrent power upon the subject.

"The Congress of the United States shall have power to *regulate commerce with foreign nations* and among the several states and with the Indian tribes."

Constitution of the United States, Article I, Section 8.

"The organization of our state and federal system of government is such that the people of the several states *can have no relation* with foreign powers in respect to commerce or any other subject, *except through the government of the United States*, and its laws and treaties."

Bowman v. Chicago etc. Railway Co., 125 U. S., on page 482.

"The power granted to Congress, to regulate commerce among the states, being *exclusive when the subjects are national in their character*, or admit of only one uniform system of regulation, the failure of Congress to exercise that power in any case, is an expression of its will *that the subject shall be left free from restrictions* or impositions upon it *by the several states*."

Robbins v. Shelby Co. Taxing Dist., 120 U. S., 489, and cases cited;
Atlantic Tel. Co. v. Philadelphia, 190 U. S., 160.

What subjects could be more national in their character than the right of sale and use in each state of the products of the different states and nations?

Earlier decisions in anywise in conflict overruled.
See *Asher v. Texas*, 128 U. S., 129;
LeLoup v. Port of Mobile, 127 Id., 647-8;
Georgia Packing Co. v. Mayor etc., 60 Fed. Rep., 780.

The whole power over foreign and interstate commerce is in the Congress of the United States, and no right of control of such commerce is left in the states, or in any state agency. Under this authority Congress could tax, burden or exclude entirely the commerce of foreign nations or it could favor the import of the products of any one nation over the same product of any other nation. For a particular example, Congress could say, if it would, that no asphalt imported from any foreign country could be sold or used in any road improvement in the United States, or provide that no foreign asphalt except that from the island of Trinidad should be imported to or sold within the United States or be used on a street or road improvement in any city of the United States. Thus it could create a monopoly of the Trinidad Lake asphalt here. This, though, only proves that the power is in nowise vested in the states; and that the exercise of this power by any state or municipality is unauthorized and void and violative of the commerce clause of the Federal Constitution above quoted.

In re Saunders, 52 Fed. Rep., 802;
Hall v. Drain. 95 U. S., 488-489;
Arnold v. Yanders, 56 Ohio St., 417;
People v. Hawkins, 157 N. Y., 1;
The State v. S. S. Constitution, 42 Calif., 578;
Ereman v. Titusville, 153 U. S., 289;
Bowman v. Chicago, etc., Ry. Co., 125 U. S., 490 to 494;
Robbins v. Taxing Dist., 120 U. S., 489;
Walling v. Michigan, 116 U. S., 460;
Webber v. Virginia, 103 U. S., 350-351;
Guy v. Baltimore, 100 U. S., 434,
Railroad v. Husen, 95 U. S., 465;
Henderson v. Mayor, 92 U. S., 260-273;
The Roanoke, 189 U. S., 185.
Instructive extracts from Mr. Webster's great argument in Gibbons v. Ogden. (over)

Mr. Webster's brief reported with case of *Gibbons v. Ogden*, 9 Wheaton 1, the first case before the Supreme Court of the United States involving the meaning and scope of the commerce clause of the Federal Constitution, furnishes us with valuable history and forecasted much of what has been since judicially declared upon the subject. *Inter alia*, he is there reported as saying: "Nothing was more complex than commerce; and in such an age as this, *no words embraced a wider field than commercial regulation.* Almost all the business and intercourse of life *may be connected*, incidentally, more or less, with commercial regulations." (9 Wheaton, pages 9 and 10).

"The right set up in this case under the laws of New York is a *monopoly*. Now, he thought it is very reasonable to say that the Constitution *never intended to leave with the states the power of granting monopolies*, either of trade or navigation; and *therefore that as to this, the commercial power of congress, was exclusive in Congress.*" (Id. page 10).

Few things were better known, than the immediate causes which led to the adopting of the present constitution; and he thought nothing clearer than that the prevailing notion was to regulate commerce; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different states, and to place it under the protection of a uniform law. * * * The states could still, each for itself, regulate commerce, and the consequence was a perpetual jarring, and hostility of commercial regulation." (Page 11).

"And he insisted that the nature of the case, and of the power, did imperiously require, *that such important authority as that of granting monopolies of trade and navigation, should not be considered as still retained by the states.*" (Id. page 14).

"This doctrine of general concurrent power in the states is insidious and dangerous. If it be admitted, no one can say where it will stop" (Id. page 17).

These observations are profoundly suggestive upon the question now here.

To them may be added the axiomatic proposition: That the commerce clause of the Federal Constitution operates as a part of the organic law of every state and city in this country and as prohibitive of any state law or city ordinance excluding or preferring the purchase, sale or use of the products of one state or country over the like products of other states and countries.

Muscogee Nat. Tel. Co. v. Hall, 118 Fed. Rep., 382.

IV.

The resolutions and ordinances in question respectively specifying that the asphalt used in these pavements "shall consist of genuine Trinidad Lake Asphalt" arbitrarily excluded the like asphalt of any other country, and even of several of our own states, from being used in the pavements ordered, and thereby violated the commerce clause of the Constitution of the United States.*

The parts of the record on which this point is based are:

"Amendment to the tenth charge of the bill," pages 6 and 7, *ante* (Pr. Rec. 22).

Proofs stated and cited in "Section J", pages 28 to 34 *ante*.

Particularly facts and references in paragraph 1 of point III *ante*, pages 86 to 91.

Complainant's assignment of errors numbered 24, 25, 26 and 27 (Pr. Rec. 30)

Complainant has never made any question of the right of the city of Westport to select as paving material stone, wood, brick, asphalt or any other kind of paving material. And where there is a substantial difference in the species of

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*This point and the next attacks the resolutions and ordinances for the pavements as legislative proceedings. The subsequent points are attacks upon the municipal acts as administrative proceedings.

one of these materials, complainant concedes a right of municipal selection and designation between them, e. g. such as cedar rather than hickory, oak or other wood; vitrified brick rather than the ordinary manufacture of brick; sandstone rather than limestone or granite; pitch asphalt as the part of the composition for an asphalt pavement rather than rock asphalt or the converse thereof. These and the like municipal designations of paving material leave no foot print of fraud or interference with commerce and on their face excite no natural suspicion or spirit of inquiry as to the municipal action, as when the material is required to come from a particular place.

Complainant respectfully submits, though, that the right to select as paving material between stone, wood, brick and asphalt as paving material is a very different thing from a right to select the place from which or the person from whom the material shall come.

The liberty of judgment and choice of asphalt as a material for use in street pavement that is claimed for the board of aldermen by the defendant in this case, is not the conceded liberty of choice of asphalt, sand, etc., rather than stone, brick or wood for the pavements, but the liberty to prescribe the place from which the asphalt used in the street pavements shall come; the liberty to exclude the like asphalt from every other place in the world and to exclude all persons but the defendant from commerce with the city of Westport in the matter of asphalt street paving.

(See Sections "J," "K" and "L" *ante*, pages 28 to 48).

Asphalt is an article much used in manufacturing. Varnish is made of asphalt, houses are roofed with an asphalt composition, cellars are cemented therewith, and there are many other uses thereof in individual enterprises. (See "Asphalt," in Encyclopedia Britannica).

Now if a state legislative act should provide that all manufactured varnish, roofing, or cement of asphalt composition, be made of "Trinidad Lake Asphalt" or if such state

legislative act should merely provide that all asphalt other than "Trinidad Lake Asphalt," before it should be put to these uses, should undergo an inspection or be subject to a tax, there could be no kind of doubt that such discrimination against the like asphalt from other places in the world would violate the commerce clause of the Constitution of the United States.

Higgins v. Lime, 130 Mass., 1;
Minnesota v. Barber, 136 U. S., 313;
Brimmerman v. Rebman, 138 U. S., 78;
Voight v. Wright, 141 U. S., 62;
Scott v. Donald, 165 U. S., 93-94;
Collins v. New Hampshire, 171 U. S., 31;
State v. Sante, 111 Iowa, 1.

If a city has the same liberty of purchasing from where and from whom it pleases as an individual, then why does it not follow that a city or the state has a right to the same protection as an individual against its own legislative acts which deny the state or city the freedom of interstate and foreign commerce?

It would seem to be an axiomatic proposition that a legislative act which circumscribed or hampered state or municipal action with interstate or foreign commerce would come equally under the condemnation of the commerce clause of the Constitution of the United States as would such a legislative act in hampering or interfering with commerce of the citizens of a state with other states or foreign countries.

In point, *State ex rel Treat v. Coler*, 166 N. Y., 144; 59 N. E. Rep., 776.
See also *Arnold v. Yanders*, 56 Ohio St., 417; 47 N. E. Rep., 50;
People v. Hawkins, 157 N. Y., 1; 51 N. E. Rep., 257.

A statute of Kentucky in the exercise of state police power, forbade the use of oil for illuminating purposes that

would ignite below a certain temperature and required all oil offered for sale to be previously subject to state inspection. This statute was upheld by the Supreme Court of the United States as a reasonable police regulation and as not violating any interstate commerce right.

Patterson v. Kentucky, 97 U. S., 502.

This decision was reviewed and explained in a later decision of the court as follows:

"*The Kentucky statute prescribed no test* of inspection which, in view of the nature of the property, was either unusual or unreasonable, *or which by its necessary operation discriminated against any particular oil because of the locality of its production. If it had* prescribed a mode of inspection to which citizens of other states, having oils designed for illuminating purposes, and which they desired to sell in the Kentucky market, could not have reasonably conformed, *it would undoubtedly have been held to be an unauthorized burden upon interstate commerce.*"

Minnesota v. Barber, 136 U. S. 327-328.

Mr. Justice Brewer (in a circuit court), declaring void a beef inspection ordinance of the city of Topeka, as violative of the commerce clause of the Constitution of the United States, said:

"The moment you find any act of the legistature or any ordinance of a city, which prevents the free exchange of lawful articles of commerce between the states, you find an act or ordinance which contravenes the commerce clause of the United States Constitution."

Ex parte Keiffer, 40 Fed. Rep. 399 and 402;
See also *Hall v. DeCuir*, 95 U. S. 488;
Georgia Packing Co. v. Mayor etc., 60 Id., 774;
Spellman v. City of New Orleans, 45 Id., 3;
Higgins v. Lime, 130 Mass. 1;
Sayre Boro v. Phillips, 148 Pa. St. 482;
Commonwealth v. Snyder, 182 Pa. St. 633;
State v. Santee, 111 Iowa, 1.

An act of the state of Virginia was entitled, "An Act to prevent the selling of unwholesome meat." This act made it unlawful to sell any beef or mutton slaughtered one hundred miles or more from the place at which it was offered for sale unless it was previously inspected and approved by the local inspectors appointed under that act. It also provided for an inspection fee of one cent per pound, to be paid by the owner of ~~the~~ such meats. There was no provision requiring any inspection of fresh meats from animals slaughtered within one hundred miles from the place at which ~~the~~ such meat was offered for sale. The Act was held void by the Supreme Court of the United States as in violation of the commerce clause of the Federal Constitution because it discriminated against the sale of products of other states in favor of the products and industries of Virginia. Said the court, as the reason for its conclusion:

"The owners of meats here in question, although they were from animals slaughtered in Illinois, had the right, under the constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale."

Brimer v. Rebman, 138 U. S. 78-82.

The Supreme Court of the United States again said:

"Any local regulation, *which* in terms or *by necessary operation*, denies this equality in the markets of a state, is, when applied to the people and products or industries of other states, a direct burden upon commerce and void."

Voight v. Wright, 141 U. S. 67, and cases cited.

The nearest decision to the case at bar is a decision of the Court of Appeals of New York, rendered since this suit was begun. A statute of New York required all stone used in state or municipal work to be cut, dressed and carved within the boundaries of the state of New York, and also provided that all contracts for such public work should contain a like clause; so that both the contract and statute

would exclude from such work stone that came from outside the state; the penalty prescribed by the statute for any violation thereof being a forfeiture of all compensation contracted to be paid for the work. This statute was declared void by the court, in the following words:

"We think that this statute is void, not only for the reason stated in our decision in the case cited, but for the further reason that it is in conflict with the commerce clause of the Federal Constitution. It is a regulation of commerce between the states which the legislature had no power to make. The citizens of other states have the right to resort to the markets of this state for the sale of their products, whether it be cut stone or any other article which is the subject of commerce. *The citizens of this state have the right to enter the markets of every other state to* sell their products, *or to buy whatever they need*, and all interference with the freedom of interstate commerce by state legislation is void. Under the Constitution of the United States, business or commercial transactions cannot be hampered or circumscribed by state boundary lines, and that is the effect of the statute in question."

People ex rel Treat v. Coler, 166 N. Y., on page 150;

Same case is reported in 59 N. E. Rep., 776.

The Federal constitutional provision protects foreign commerce from all state interference precisely to the same extent that it protects interstate commerce from such interference.

Chy Lung v. Freeman, 92 U. S. 275;
Henderson v. Mayor of New York, Id., 268.
"No difference is perceivable between the two."
Crutcher v. Kentucky, 141 U. S., 57-58;
See also *Hall v. DeCuir*, 95 Id., 490.

The Supreme Court of the United States appropriately observed, in declaring the identity and equality of the exclusive power of Congress over foreign commerce with the powers over interstate commerce in the case of *Chy Lung v. Freeman*, *supra*, in the following words:

"If it be otherwise, a single state can embroil us in disastrous quarrels with other nations."

Any state provision which prevents or obstructs a sale, demand or use of an article of foreign or interstate commerce violates the Constitution of the United States.

State ex rel Treat v. Coler (N. Y. Ct. App., March 8, 1901), 166 N. Y. 144, 59 N. E. Rep., 776;
Brennan v. Titusville, 153 U. S. 301-302;
Spellman v. New Orleans, 45 Fed. Rep., 3;
Ex parte Keiffer, 40 Id., 399;
Arnold v. Yanders 56 Ohio St. 417; 47 N. E. Rep., 50;
People v. Hawkins, 157 N. Y. 7-8, 15-16;
In re Davenport, 102 Fed. Rep., 541-543;
Schollenberger v. Pennsylvania, 171 U. S. 1;
Scott v. Donald, 165 U. S. 58, 93-4, 100;
Vance v. Vandercook Co. No. 1, 170 U. S. 439;
Bowman v. Chicago Ry. Co., 125 U. S. 499;
Colling v. New Hampshire, 171 U. S. 31;
Crutcher v. Kentucky, 141 U. S. 47;
Tiernan v. Rinker, 102 U. S. 126.

"There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country; *the one would be a necessary sequence of the other.* No goods would be imported if none could be sold."

Brown v. Maryland, 12 Wheaton, page 439.
(See also authorities above cited.)

The same idea is reiterated in another part of the same opinion as follows:

"Commerce is intercourse, one of the most ordinary ingredients is traffic. *It is inconceivable, that the power to authorize this traffic*, when given in the most comprehensive terms, with the intent that its efficiency should be complete, *should cease at the point when its continuance is indispensable to its value.* To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It

is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. *It must be considered as a component part of the power to regulate commerce.*"

Brown v. Maryland, 12 Wheaton, pages 446-447.
See also *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 242-243;
People v. Hawkins, 157 N. Y. 8.

The freedom to use an article of interstate or foreign commerce is also protected by the commerce clause of the Constitution.

Scott v. Donald, 165 U. S. 100;
Vance v. Vandercook Co. No. 1, 170 U. S. 439.

The Supreme Court of Indiana, in holding a legislative act in that state void for violating the commerce clause in question, said:

"It is not in the power of the legislature *to prevent* one citizen from buying or another from selling property. The rights of property are not subject to such absolute legislative control."

State ex rel Corwin v. Oil, Gas & Mining Co., 120 Ind., 583.

What is the effect of the specification of the material to be used on a street pavement, by the place from which it comes, if not to prevent the sale of the same product coming from other places?

"The matter of interstate commerce is a national matter *with which states can in nowise interfere*. The jurisdiction of the Federal government *absolutely excludes* the state from directly or indirectly hampering or taxing commerce between the states."

The State ex rel Carr v. Sleeping Car Co., 114 Ind. 159.

"No sort of trade can be carried on between this country and any other, to which this power does not extend."

Gibbons v. Ogden, 9 Wheaton, bottom of page 193.

"We think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce or to interfere directly with its freedom, does encroach upon the exclusive power of Congress."

Hall v. DeCuir, 95 U. S. 488.

It was not necessary to the invalidity of the resolutions and ordinances that asphalt from another place than Trinidad Lake should be in the city of Westport or *in transitu* to that place when the resolutions were adopted excluding any such asphalt from use in the pavements.

Hall v. DeCuir, 95 U. S., 488-489;
McCall v. California, 136 U. S., 104.
"No goods would be imported if none could be sold."
Brown v. Maryland, 12 Wheat., 438, 446-7.

A city can have no more right than a state to discriminate against articles of interstate or foreign commerce.

Guy v. Baltimore, 100 U. S. 434;
Ex parte Keifer, 40 Fed. Rep., 399;
Spellman v. New Orleans, 45 Id. 3;
Brennan v. Titusville, 153 U. S. 301-2;
Penn Mut. Life Ins. Co. v. Austin, 168 Id. 685;
Georgia Packing Co. v. Mayor etc., 60 Fed. Rep., 774.

"The law recognizes in no one a right to create or maintain a monopoly."

Keene v. Mayor, 101 Ga. 592;
See also *City of Atlanta v. Stein*, 111 Ga. 789;
Town of Kirkwood v. Merimac Highlands Co., 94 Mo. App., 637;
State v. Santee, 82 N. W. Rep., 445, *s. c.* 111 Iowa, 1;

Diamond v. City on Mankato, 88 Minn. ——, 93 N. W. Rep., p. 911;
Reddersheimer v. Meyer, 52 La. Ann. 2089;
City of Chicago v. Rumpf, 45 Ill. 90;
City of Lakeview v. Tate, 130 Id. 247;
Fishburn v. City of Chicago, 171 Ill. 338;
Dillon on Mun. Copr. (4th Ed.) Secs. 322, 325, 329, 362, 694 and 695;
Brook v. Cooper, 50 N. J. Eq,, 761.

If the legislature of the state of Missouri had stated in the charter of cities of the fourth class (Westport is a fourth class city, *ante* page 21) that such cities shall pave their streets with asphalt from Trinidad Lake, it is clear such statute would violate the commerce clause of the Constitution of the United States, because of the discrimination in favor of "Trinidad Lake asphalt" against the like asphalt of Cuba, Mexico, Venezuela and other foreign countries, and against the asphalt abounding in California, Utah and Texas of our own country. This proposition is clear.

People ex rel Treat v. Coler, 166 N. Y., 144;
Minnesota v. Barber, 136 U. S., 313;
Bremmer v. Rebman, 138 U. S., 78;
Voight v. Wright, 141 U. S., 62;
Guy v. Baltimore, 100 U. S., 443.

It must therefore follow that the city of Westport, the creature of the state legislature, could not do, as against the asphalts of other places, what the state legislature could not do or authorize in terms to be done.

"The power of a municipal corporation to enact by-laws being delegated by the legislature cannot, of course, be more extensive than the power of the delegating body. Consequently the by-laws or ordinances enacted by the council must not be in contravention of the Constitution of the United States." (Beach on Public Corporations, Sec. 506).

"If a state, with its recognized power of sovereignty, is impotent to obstruct interstate commerce can it be said any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?" (*Addyston Pipe & Steel Co. v. U. S.*, 175 U. S., 230).

"What a state may not do it may not authorize a city to do." (*Georgia Packing Co. v. Mayor, etc.*, 60 Fed. Rep., 779).

"The state cannot confer upon the subordinate agencies of the government powers it does not possess and cannot exercise." (*Town of Greensboro v. Ehrenreich*, 80 Ala., 582).

"When the state creates a city or borough it cannot confer upon the municipality powers that the state does not possess. It cannot confer upon the creature immunity from the settled limitations that bind its own action. The municipality remains a part of the state after its creation as truly as the town or village was a part of the state before it acquired a charter. *It can have no better right to adopt discriminating trade regulations than the state has.*" (*Sayreborough v. Phillips*, 148 Pa. St., 489).

"The charter rights of Kansas City cannot exceed the power of the people of the state through their legislature." (*Barber Asphalt Paving Co. v. Ridge*, 169 Mo. l. c., 387).

"A board of education can exercise no greater power than the legislature can confer upon it." (*Adams v. Brennan*, 177 Ill., 194).

The last case is entitled to especial notice. It involved the right of a board of directors of a school district to make a contract for the building of a public school with the provision that only union labor should be employed in the construction of the building. The Supreme Court of Illinois, commenting upon and deciding adversely to such power of the school board, and as its reason for such adverse decision said:

"It is unquestionable that if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should, by a statute, undertake to require this board,

as the agency of the state in the management of school affairs in the city of Chicago, to adopt such rule or insert such provision in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void, as in conflict with the constitution of the state. If such a restriction were sought to be enforced by any law of the state, it would constitute an infringement upon the constitutional rights of citizens, so that the state, in its sovereign capacity, through its legislature, could not enact such a provision. (*Millett v. People*, 117 Ill., 294; *Frorer v. People*, 141 Ill., 171; *Braceville Coal Co. v. People*, 147 Ill., 66; *Ramsey v. People*, 142 Ill., 380; *Ritchie v. People*, 155 Ill., 98; *People v. Live Stock Exchange*, 170 Ill., 556.) There is no more reason or justification for such a contract as this than there would be for a provision that no one should be employed except members of some particular party or church. In any such case it might be said that the board entertained a *bona fide* opinion that the members of some political party were more intelligent and better capable of performing the work, so that better results would be attained; or that the members of some church, on account of their higher standing or morality, would more faithfully and conscientiously carry out the contract. The fact that the board may have been of the opinion that its action was for the benefit of the public cannot afford a justification for limiting competition in bidders, and requiring them to abandon the right to contract with whomsoever they may choose for the performance of the work. There seems, however, to be a claim that the board of education, although it could not be lawfully required or authorized to make such a contract, may have some sort of discretion to do so; and the only question in the case on the subject of the validity of such contract is whether the board possesses power beyond that of the legislalure, in which is invested the entire legislative authority of the state. Upon what theory it could be claimed that this board of education, which exercises merely the function of the state in maintaining public schools within a limited portion of the state, can possess either power or discretion which the state in its sovereign capacity could not confer upon it, we are unable to imagine. No argument is made which would justify such a conclusion. *There can be no greater power of the board to act of its own motion than*

by virtue of positive law. The results in either case are equally in conflict with the organic law, and such legislation, contract, or action, whatever form it may take, is void." (177 Ill., 199-200.)

Nor does it make any difference that a resolution or ordinance questioned, affects only the pavement of a single street or a part of a street, it is void, if it in the smallest degree exercises a function belonging to the Congress of the United States.

"Questions of power *do not depend* on *the degree* to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. The question is, *where does the power reside;* not how far it will be probably abused; *and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.*"

Brown v. Maryland, 12 Wheaton, on page 439;
See also Id., end of page 447;
Smith v. Southwestern Ry. Co., 181 U. S., 255;
People v. Raymond, 34 Calif., 499;
State v. North & Scott, 27 Mo., 480;
State v. Portland Gas Co., 153 Ind., 489;
Bailey v. Master Plumbers, 103 Tenn., 114;
Nester v. Brewing Co. 161 Pa. St., 473, 481;

Of the validity of a by-law of the Plumbers Association of Memphis, under the Tennessee anti-trust act, the Supreme Court of that state said:

"It is not the number of persons participating in the by-law, or *extent of the territory included*, but the injury to the public in that territory, *however restricted*, that characterizes the interruption of trade as illegal."

Bailey v. Master Plumbers 103 Tenn., 114.

"The shortness of the road does not change its character. The restriction is not against great works but against all works of that kind."

Hubbard v. Township, 25 Mich., 155,

"The Government of the United States, within the scope of its power, operates *upon every foot* of territory under its jurisdiction."

Roberts v. Northern Pacific R. R., 158 U. S., 21, and cases cited.

"The power of the National Government over commerce with foreign nations and among the several states is broad and comprehensive. It reaches the interior of every state in the union, so far as it may be necessary to protect the products of other states and countries from discrimination by reason of their foreign origin." *Brown v. Maryland*, 12 Wheat., 419;

Guy v. Baltimore, 100 U. S., 442.

Thus it is made clear that when the city enacts a resolution or ordinance covering only a single street or part of a street, that such action is as much responsible to Federal law, and to defeat thereby, as if such resolution or ordinance included the whole of every street in the city.

The legislature of the state of Michigan authorized the City of Detroit to own and operate its street railways. This act was held void as violating a provision of the state constitution forbidding the state to engage in any internal improvement. Said the Supreme Court of the state thereon:

"If the legislature may authorize the city of Detroit to enter into the proposed arrangement, it may authorize any other municipality to do so, and, by concert of action between the various municipalities, they may cover the state with the means of rapid transit, owned and operated by the municipalities. This would enable the state to do by means of agencies called into being by itself, what it cannot itself do, and what the Constitution forbids its doing."

Attorney General v. Pingree, 120 Mich., 570.

If a city could discriminate in its legislative capacity in favor of or against a particular paving material of one state over the like product of other states, as to a single street pavement, but not as to all in one legislative act, it could, by paving only one street at a time, with the products of a

specified state or nation, exclude the like products of all other states and nations until all of its streets were paved, and in that way evade the control and limitation of our Federal Constitution. A state or city cannot thus accomplish indirectly what is forbidden to be done by it directly. It is a sacred duty of the courts of the country to prevent the success of any evasive legislation.

Passenger Cases, 7 How. (U. S.), on page 458;
Parret's Chinese Case, 6 Sawyer (Fed.), 350, 382;
People v. Raymond, 34 Calif., 492;
Gotcher v. Burrows, 9 Hump. (Tenn), 588 *et seq;*
Jarrott v. Moberly, 103 U. S., pages 585 and 586;
People v. Hawkins, 157 N. Y., 8;
Fishburn v. Chicago, 171 Ill., on pages 343-4;
State v. North & Scott, 27 Mo., 464.

The same argument and authorities answer equally and fully the possible suggestion that the total asphalt (foreign material) used in the street pavement cannot exceed 15 per cent of the 2½ or 3 inches of the crest of the pavement. (*Ante*, page 31).

The natural tendency of such specification was to make all of the work cost more money, and it therefore vitiates the proceedings.

Matter of Petition of Laura E. Eager, 46 N. Y., 106-107;
McMullen v. Hoffman, 174 U. S., 648 to 651.

Complainant being an owner of property charged with the cost of the improvement has a right to invoke the protection of the commerce clause of the Constitution of the United States against the resolutions and ordinances in question and to complain of the exclusion of the asphalt from elsewhere and of paving contractors other than the defendant from coming in competition for the pavements in question. For the commerce clause of the Constitution of the United

States was intended for the benefit of the purchasers and users as much as for the importers and vendors of any article of interstate or foreign commerce. This has been expressly recognized and enforced in this court and recently in the New York Court of Appeals.

Said this court in *Minnesota v. Barber*, 136 U. S., on page 326:

"The people of the state of Minnesota have as much right to protection against the enactments of that state interfering with the freedom of commerce among the states, as have the people of other states." (See also *Scott v. Donald*, 165 U. S., 98, and *People ex rel Treat v. Coler*. 166 N. Y., on page 150.

V.

The resolutions and ordinances for the street pavements required contracts which were in restraint of interstate and foreign trade and commerce and therefore violated the act of Congress of July 2nd, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

(See this act of Congress printed in convenient form, 166 U. S., 291).

The parts of the record on which this point is based are the following:

"Amendment to the tenth charge of the bill," *ante* 6 (Pr. Rec. 22).

Resolutions and ordinances quoted and cited in "Section J", *ante* 28.

Complainant's assignment of errors No. 19 and No 20. (Pr. Rec. 29.)

Section 1 of this anti-monopoly act of Congress declares every alleged contract in restraint of trade or commerce among the several states or with foreign nations, illegal, as follows:

"Sec. 1. *Every contract*, combination in the form of a trust or otherwise, or conspiracy, *in restraint of trade or commerce among the several states, or with foreign nations*,

is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

The resolutions and ordinances for the pavements did not authorize a contract for the work which would permit the like asphalt from other places than Trinidad Lake to be used in the pavement, for with the specific provision therein that the asphalt used in such pavements should be "Trinidad Lake asphalt", the contract, which was required by municipal law to follow the resolutions and ordinances, could make no other or different requirement.

King Hill Brick Mfg. Co., v. Hamilton, 51 Mo. App., 120;
Partridge v. Lucas, 99 Calif., 519;
Piedmont Paving Co. v. Allman, 136 Id., 88.

It must therefore be said that the resolutions and ordinances required contracts for the pavements which were prohibited by this anti-monopoly act of Congress and were therefore void.

The case of *Pensacola Tel. Co. v. West, etc. Tel. Co.*, 96 U. S., 1, is instructive if not conclusive on this point. The decision in that case construed an act of Congress concerning telegraph companies, which was held to be an act governing interstate commerce and to nullify a legislative act of the state of Florida which had undertaken to create a monopoly in favor of the Pensacola Telegraph Co. Referring to that act of Congress the court said "the statute of July 24, 1866, in effect, amounts to a prohibition of all state monopolies in this particular." So it may be as truly said in this case, that section 1 of the anti-monopoly act of Congress of 1890 which declared illegal every contract in restraint of trade among the several states or with foreign nations "in effect amounts to a prohibition of all state monop-

olies in this particular," and nullifies all state statutes or city ordinances as well as contracts making a contrary provision.

See also *Henderson v. New York*, 92 U. S., 272;
Muscogee Tel. Co. v. Hall, 118 Fed Rep., 382.

Judge Dillon, in his work on Municipal Corporations (4th Ed.) says:

"SEC. 329. The rule that a municipal corporation can pass no ordinance which conflicts with its charter, or any general statute in force and applicable to the corporation, has been before stated. *Not only this, but it cannot*, in view of its incidental power to pass by-laws, or under any general grant of authority, *adopt by-laws which infringe the spirit, or are repugnant to the policy of the state*, as declared in its general legislation."

See also *Wood v. Kansas City*, 162 Mo., 309.

The undoubted policy of the act of Congress was to prevent any monopoly or restraint of trade or commerce among the several states or with any foreign nation. The purpose of the resolutions and ordinances is repugnant to that policy, because they make a monopoly of the asphalt of the Trinidad Lake for the pavements.

The resolutions and ordinances in question are *ultra vires* and void, because they required contracts for the pavements which were in restraint of interstate and foreign trade and commerce, contrary to the Act of Congress.

State v. Distilling Co., 29 Neb., 700;
Master Plumbers v. Memphis, 103 Tenn., 99;
San Antonio Gas Co. v. State of Texas, 54 S. W. Rep., 289;
Lowry v. Tile, Mantle & Grate Assn., 106 Red Rep., 38;
Lowry v. Tile, Mantle & Grate Assn., on appeal, 115 Fed. Rep., 27.

The doctrine laid down in the cited quotation from Judge Dillon is exactly in line with the decisions of this court, and other courts, that contracts prohibited by statute are void because contrary to public policy, as manifested by such statute.

Bement v. National Harrow Co., 186 U. S., 88;
United States v. Freight Assn., 166 U. S., 340-1;
Miller v. Ammon, 145 U. S., 421-427;
Cooper Mfg. Co. v. Ferguson, 113 U. S., 733;
Hanover v. Doane, 12 Wall, 342-348;
Kirhen v. Milcher, 43 Fed. Rep., 644;
Chicago St. P. & M. Ry. Co. v. Wabash N. L. & P. Ry. Co., 61 Id., 997;

And this is true though such illegality of the contract is made to appear by evidence *aliunde*.

McMillan v. Hoffman, 174 U. S., 653;
Sprague v. Rooney, 104 Mo., 349.

VI.

The contracts specified "Refined Trinidad Lake asphaltum" as the asphalt required to be used in the pavements, and were vitiated by such specification under the anti-monopoly act of Congress aforesaid.

The parts of the record on which this point is based are the following:

"Amendment to the tenth charge of the bill", (*ante* page 6).

Trinidad Lake asphalt provision in the contracts, (*ante* pages 30-31).

Complainant's assignment of errors, No. 16 and No. 17 (Pr. Rec. 28).

Congress had the right to prohibit all contracts in restraint of interstate or foreign trade. In *Addyston Pipe & Steel Co. v. United States*, 175 U. S., on page 229, this court said:

"If certain kinds of contracts directly as already stated, limit or restrain, and hence regulate interstate commerce,

why should not the power of Congress reach these contracts just the same as if the legislation of some state had enacted the provisions contained in them?"

Section 1 of the act of Congress in question declares every contract in restraint of trade or commerce among the several states or with foreign nations to be illegal, and provides that every person entering into such a contract shall be guilty of a misdemeanor punishable by fine or imprisonment, or by both fine and imprisonment.

The contracts for the pavements, with "Trinidad Lake asphalt" specification, being thus prohibited by this anti-monoply act of Congress, they are void. This proposition is sustained by the authorities cited at the top of page 123.

The contracts for the pavements being void, the tax-bills are therefore void.

Capron v. Hitchcock, 98 Calif., 430;
Brady v. Bartlett, 56 Id., 350;
Kiley v. Oppenheimer, 55 Mo., 374.

VII.

The specification in the resolutions, ordinances and contracts for the pavements in question, that they should "consist of a genuine Trinidad Lake Asphalt pavement" was due to a conspiracy or combination between defendant and the Westport city authorities, in violation of the anti-monopoly act of the Congress of the United States.

The parts of the record on which this proposition is based are:

1. Allegations of the "tenth" charge of the bill, (*ante* page 6).
2. "Amendment to the tenth charge" of the bill, (*ante* pages 6-7).
3. Sections "K" and "L" of the testimony cited, (*ante* pages 34 to 48).
4. Complainant's assignment of errors No. 20 and No. 21, page 29 Pr. Rec.

A municipal corporation is "a person" and may be a conspirator within the meaning of the anti-monopoly act of Congress of 1890. (See section 8 thereof).

See also *Ochs v. People*, 124 Ill., 399;
Madden v. State, 59 N. J. L., 324;
People v. Duke, 44 N. Y. Supplement, 336;
Oakland v. Carpenter, 13 Calif., 540.

This point is based upon the provision in Section 1 of the act of Congress, against any "combination" or "conspiracy in restraint of trade" etc. (This section is quoted *ante* pages 120-121).

This act of Congress includes all forms of combinations and conspiracies in restraint of trade. "Combinations are condemned not only when they take the form of trusts, but in whatever form found if they be in restraint of trade or commerce." (*United States v. Debs*, 64 Fed. Rep., 747).

All of the law writers have defined conspiracy as follows: "An agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means." The conspiracy charges in this case are as to the "Trinidad Lake asphalt" specification made in the resolutions, ordinances and contracts for the pavements in question.

"Conspiracies are odious in law and are always taken *mala parte*, and properly." (*The State v. Buchanan*, 5 Harris & J., (Md.) 354).

A combination to prevent competition is an unlawful act, a fraud and a conspiracy.

Brown v. Jacobs Pharmacy Co., 115 Ga., 433-443;
McMillan v. Hoffman, 174 U. S., 649;
Bailey v. Association of Plumbers, 103 Tenn., 99;
San Antonio v. State, 54 S. W. Rep., 289;
Adams v. Breman, 177 Ill., 202;
Foss v. Cummings, 149 Ill., 353;
Fishburn v. Chicago, 171 Ill., 338;
Elkhart Co. Lodge et al v. Carey, 98 Ind., 238;

Nester v. Continental Brewing Co., 161 Pa. St., 473;
Morris Coal Co. v. Barclay Coal Co., 68 Pa. St., 174;
State ex rel Snyder v. Natural Gas and Oil Co., 153 Ind., 483;
M. Taggart v. Harrison, 12 Kansas, 62;
Chapin Bros. v. Horn Bros., 83 Ia., 156;
Hoffman v. McMullen, 83 Fed. Rep., 372; affirmed 174 U. S., 639;
Gibbs v. Smith, 115 Mass., 592.

The city resolutions, ordinances and contracts for the asphalt street pavements which specified "Trinidad Lake Asphalt" for such pavements, *pro tanto*, excluded as commerce the asphalt from every place in the world, except the Trinidad Lake in the island of Trinidad; and where, as shown in this case, the defendant has and had at the times in question a monopoly of "Trinidad Lake asphalt" pavement in Westport, Mo., such specification also excluded all other paving contractors of the entire world from getting or doing the pavements in question. Such specification of "Trinidad Lake asphalt" thus preventing competition in interstate and foreign trade and commerce operated directly and not remotely upon such trade and commerce and was therefore prohibited by the act of Congress.

United States v. Joint Traffic Assn., 171 U. S., 575-577;
Chesapeake & O. Fuel Co. v. U. S., 115 Fed. Rep., 610, 623-624;
Gibbs v. McNealy, 118 Fed. Rep., 120;
United States v. Swift & Co., 122 Fed. Rep., 529.

It is not necessary howeverthat the effect of a law, ordinance or contract should entirely prevent all competition in trade and commerce to make it void under the act of Congress.

United States v. Chesapeake & Ohio Fuel Co., 105 Fed Rep., 93;
Same case on appeal, affirmed, 115 Fed. Rep., 610, 623-4;
Texas Standard Oil Co. v. Adone, 83 Tex., 650;
Bailey v. Master Plumbers, 103 Tenn., 99;

It is no answer to the charge of conspiracy in this case that the testimony fails to show that the city authorities and petitioning resident owners received any money or other valuable consideration from the defendant for making the specification for Trinidad Lake asphalt for the pavements in question. It may be that the only consideration received or hoped for by the Westport board of aldermen was political favor from Hugh J. McGowan, or his assistants, or it may be that they yielded to the blandishments and importunities of McGowan or his assistants because they were so weak and irresponsible as not to understand that it was their duty to represent and protect, and not betray, the non-resident owners and non-petitioning resident owners of abutting lands; but when they became, as the testimony shows, mere spokes in the wheel of Hugh McGowan's scheme to monopolize asphalt street pavement in the city of Westport for the defendant they became his conspirators, whether they received a valuable consideration for their action or were only good fellows in the part they played in the plot.

Ochs v. People, 124 Ill., 400;
United States v. Newton, 52 Fed. Rep., 275;
Stoval. v. F. & M. Bank, 8 Smedes & Marshall, (Miss.), 306;
United States v. Chesapeake & O. Fuel Co., 105 Fed. Rep., 93;

One of defendant's attorneys, examined as a witness by complainant, conceded that no petition of resident property owners was required by the Westport charter to authorize municipal proceedings to pave a street (Pr. Rec. p. 45; see also testimony of Geo. L. Love, city clerk, Id., p. 73).

The testimony stated and cited in Sections "K" and "L" is conclusive of the alleged conspiracy. (See *ante*, pp. 34 to 48)

If there was no combination or conspiracy between the defendant's agents and the board of aldermen of Westport

in the matter of contracting for street paving and the specifications of Trinidad Lake asphalt, then:

(1) Why did the board of aldermen of Westport wait in each instance, before deeming or declaring a street pavement necessary, for the defendant's agents to procure the signatures of resident owners of the abutting lands to a petition asking for such pavement, when such petition was wholly unnecessary?

(2) Why was the preliminary resolution declaring a Trinidad Lake Asphalt pavement necessary always adopted by the board of aldermen whenever a petition therefor, signed by resident property owners was presented by the agents of the defendant?

(3) Why were no questions ever asked as to how these signatures were obtained?

(4) Why all of the colorable and unnecessary action?

In *Baldwin v. Whitcomb*, 71 Mo., 659, the Supreme Court of Missouri held and said:

"There is another point in this cause not to be overlooked in considering the charges of fraud which plaintiff makes. The law in respect to judgments for specific performance, when ordered by county courts, requires, as before stated, that the petition be verified by affidavit of the petitioner. No other affidavit is required. Yet we find underneath the statement that the petition was 'sworn to in open court,' the affidavit of James H. Bridges, made before Whitcomb, in which Bridges swears to the truth of the petition, and also that 'to his knowledge, no part of the within contract has been satisfied, except as stated in the petition.' What was the object of such additional and unwarranted affidavit? Its only purpose could have been to give an appearance of fairness—a color of verity and validity to the transaction—for the petition is signed by Whitcomb and not by an attorney; and having long been clerk of the county court, it may well be presumed that he was thoroughly conversant with the statutory provisions, and knew that the affidavit of Bridges added neither verification nor force to the petition. The unnecessary affidavit of Bridges would, therefore, seem to bring this case within the principle of the

maxim: '*Conusulae inconsuetae semper inducunt suspicionem.*' For, whenever fraud is the matter in issue, any unusual clause in an instrument, any unusual method of transacting the business, apparently done with the view for effect and to give to the transaction an air of honesty, is of itself a badge of fraud. For, 'when the part is overacted the delusion is broke and the fiction appears.' *Comstock v. Rayford*, 12 Sm. & Marsh, 369. This has been the rule ever since Twyne's case, 3 Coke, 81, where it was held a circumstance of grave suspicion that a clause in the conveyance recited that the gift was made honestly, truly and *bona fide.* Bump. Fraud. Convey., 50 *et seq.*, and cases cited.

Many of the circumstances above detailed, would not, perhaps, *when singly considered*, be sufficient to carry conviction to the mind that fraud had been perpetrated, but they each have a decided tendency in that direction.''

It would be no fair judgment of the repeated acts of Hugh McGowan or his assistants in concert with the board of aldermen of Westport in the 15 asphalt street pavements laid by the defendant in Westport, to consider and judge such acts, as if done for only a single pavement; the conclusive circumstance of the conspiracy is the uniformity of responsive action of the board of aldermen to the scheme and beguiling of McGowan or his assistants as to all and each of the 15 asphalt street pavements contracted for and laid by the defendant in the city of Westport.

The fact of Hugh J. McGowan, or his assistants, hovering around and circulating among the aldermen of Westport before the session of the board; the fact of their attending each session of the board of aldermen of Westport whenever the adoption of a resolution or an ordinance for an asphalt pavement with the ''Trinidad Lake asphalt'' specification was brought before the board of aldermen; the fact that the board of aldermen never by resolution declared an asphalt street pavement necessary, except upon petition of residents procured and presented by Hugh J. McGowan, or his assistants; the fact that the board of aldermen always by resolution declared necessary an asphalt street pavement and

specified "Trinidad Lake asphalt" for such pavement whenever such petition and resolution was presented by Hugh J. McGowan, or his assisstants, though such petition was not required by the charter of Westport; and the fact that such resolution was always followed by an ordinance ordering the work and specifying "Trinidad Lake Asphalt" and by a contract with the defendant, in the 15 or 16 asphalt pavements laid in Westport, conclusively proves the alleged conspiracy in the making of such specification. *Res ipsa loquitur.*

Charges of criminal conspiracy against the public have been submitted to juries on less testimony of the guilt of the accused than has been shown in this case as sufficient testimony on which to base a conviction.

Mussle Slough case, 5 Fed. Rep., 680;
Reilley v. United States, 106 Fed. Rep., 896;
United States v. Howell, 56 Fed. Rep., 21;
Drake v. Staurt, 76 Fed. Rep., 140;
The People v. Mather, 4 Wend., 229;
Morris Coal Co. v. Coal Co., 68 Pa. St., 174;
Ochs v. The People, 124 Ill., 400;
San Antonio Gas Co. v. State, 54 S. W. Rep., 289;
McKee v. State, 111 Ind., 378-385;
State v. Brown, 109 Mo., 648;
State ex Inf. v. Fireman's Fund Ins. Co., 152 Mo., l. c. 40.

"As has been often remarked, it is not necessary that direct evidence of a formal agreement should be given in such cases. If the evidence of the separate details of the transaction as it was carried out indicate with the requisite certainty the existence of a preconcerted plan and purpose, that is sufficient."

Reilley v. United States, 106 Fed. Rep., 905;

"It is not necessary to prove that the defendants came together and actually agreed, in terms, to have that design (a conspiracy) and to pursue it by common means. If it be proved that the defendants pursued by their acts the same

objects, *often by the same means*, one performing one part and another another part of the same so as to complete it with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to affect that object."

Mussle Slough case, 5 Fed. Rep,, 680.

In *State ex inf. v. Fireman's Fund Ins. Co.*, 152 Mo., on page 40, construing the Missouri State anti-trust act, and as determinative of the *quantum* of proof required in such a case, the Supreme Court of Missouri said.

"When people set out to do acts that are either *mala in se* or *mala prohibita* they do not put a sign over the door or a stamp on the act declaring their purposes and intent. Concealment is generally their prime object. But as such matters exist without agreements and rest upon common understanding and practice, so the proof of their existence may be of the same character, and while such laws are penal in their nature and should be strictly construed (*State ex rel v. Talbot*,, 123 Mo., 69; *State ex inf. v. Bland*, 144 Mo., 534), nevertheless a pool or trust may be as conclusively proved by facts and circumstances as by direct, written evidence, for in this regard they are like all other frauds, and as was well said by Campbell, J., in *Webber v. Jackson*, 79 Mich., l. c. 180: 'While fraud is not to be assumed without proof, it is nevertheless oftener shown by circumstances than any other way. When things appear that are contrary to the ordinary ways of honest business men, and call for explanations which might be, but are not, given, it is no violent inference to conclude that there is something wrong. *And where this occurs repeatedly*, and is the general characteristic of the conduct and statements of the parties, it is their own fault if they are held to the consequences.'"

See also equally to the same effect:
State ex inf. v. Armour Packing Co., 173 Mo., 356.

The parties who were charged in complainant's bill as guilty of this combination and conspiracy were not brought forward by defendant as witnesses in this case. Not a single alderman was offered as a witness to deny the charge of

conspiracy. Hugh J. McGowan, the head of this alleged conspiracy, was not called as a witness by defendant. The attorneys for the defendant and the employees of Hugh J. McGowan, and all other witnesses who were examined on this issue, were called by the complainant. Hugh J. McGowan resided in Indianapolis when the depositions herein were taken. The defendant's attitude was not to question or cross-examine a single statement of any witness on this issue lest something might be brought out which the complainant had failed to elicit, and the defendant's attorney, and the employees of Hugh McGowan, several times took refuge from complainant's questions on this issue, by declining to answer them. While the defendant has been thus reclusent on this issue the court will observe the vigorous contest on other issues of fact made by defendant in the testimony. For example, note the cross-examination of the witness, George L. Love, city clerk of Westport, and John C. Tate, on the issue not here involved as to the delivery of the Wyandotte St. and Baltimore Av. tax-bills; (Pages 78 to 81 also page 93) the defendant took the complainant to Chicago to take the deposition of Elbert B. Peck, one of defendant's employees, on that issue. (See unprinted testimony, transcript, 481).

The same is also true of other issues in the case, notably the issue in the "Amendment to the Eighth" charge of the bill, not here in the issue. The printed record in this case shows that the defendant took 60 pages of testimony on that issue. (Pages 359 to 406). On the issue tendered in defendant's answer of benefit to complainant's property the defendant took depositions of five witnesses. (Pages 286-326-354-375-396.) This action of the defendant shows the idea of defendant's attorneys of the facts of the case, viz: Where defendant considered that it had or could produce testimony on any issue tendered in the case there is no absence of cross-examination or attempt at producing testimony. Such a course on defendant's part is significant and

warrants the court in concluding that the facts on the conspiracy issue are against the defendant.

Runkle v. Burnham, 153 U. S. ., 228.

In *Sauntry v. United States*, 117 Fed. Rep., 135, the court said:

"It is said by Mr. Starkey in his work on evidence, (Vol. I, p. 546): 'The conduct of a party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his knowledge, frequently affords occasion for presumption against him since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.' 'We think that the case now under consideration affords a proper occasion to invoke this principle in the law of evidence.' "

See also *Kirby v. Talmadge*, 160 U. S., 379;
Glespie v. Keator, 56 Fed. Rep., 206;
Baldwin v. Whitcomb, 71 Mo., 658;
Mabary v. McClurg, 74 Mo., 575.

This rule was recently applied in enforcing the Missouri state anti-trust act.

State ex inf. v. Armour Packing Co., 173 Mo., 356.

The case of *Boon v. City of Utica*, 5 Miscellaneous, (N. Y.), 402, affords a glimpse of the like perversity and illegal action of a municipal board of aldermen in sticking too closely to the "Trinidad Lake asphalt" specification.

See also *Fishburn v. Chicago*, 171 Ill., 338;
Diamond v. City of Mankato, [illegible] Minn., 93 N. W. Rep., 911;
Riddersheimer v. Meyer, 52 La. Ann., 2089.

The resolutions, ordinances and contracts for the pavements are void for the reasons given in this point.

Other acts of Conspiracy and Monopoly competent testimony.

The acts of conspiracy and monopoly and attempted monopoly of asphalt pavement and the use of "Trinidad

Lake asphalt," by defendant in Kansas City at and before the times in question, shown by the testimony, are competent testimony on the issues of the defendant's alleged conspiracy and monopoly in the pavements of Westport here in question.

Lincoln v, Claflin, 7 Wall, (U. S.), 132;
United States v. Kenney, 90 Fed. Rep., 258;
Rex v. Roberts, 1 Campbell (Eng.), 399;
Luckey v. Roberts, 25 Conn., 486;
Gordrus v. Preston, 2 Day (Conn,), 205;
State v. Burnham, 15 N. H., 396-7;
McKee v. State; 111 Ind., 378.
State v. Soper, 118 Iowa 1.
12 Wall 456; 117 U. S. 591; 23 How 172.

VIII.

Defendant attempted to monopolize and monopolized "Trinidad Lake Asphalt," and contracts for its use in street pavement in Kansas City and Westport, Missouri, and thereby secured the contracts for the pavements in question, in violation of the anti-monopoly Act of Congress aforesaid.

This point is based upon the following parts of the record:

"Amendment to the Tenth charge of the bill," *ante*, 6.

Proof stated and cited in "Section K," *ante*, 34 to 41.

Complainant's assignment of errors, No. 22 and No. 23. (Pr. Rec. 30).

The provision of the Act of Congress on which this point is based, reads as follows:

"SEC. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.'

The obvious differences between this section and Section 1 of this Act of Congress are these:

Section 1 of the Act of Congress declares every contract illegal which is in restraint of interstate or foreign trade, and every person guilty of a misdemeanor who shall make any such contract or engage in any combination or conspiracy in restraint of such trade or commerce. Two people are required to violate any provision of this section.

Section 2 makes any person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, guilty of a misdemeanor, to be punished by a fine, etc. This section may be violated, though there be neither a trust combination nor conspiracy. That is to say, one party alone can violate the provision of Section 2, which prohibits acts of monopoly.

People v. Duke 44 N. Y., Supplement, 336.

And by the terms of this provision (Section 2) it is not necessary to a violation thereof that a party should be shown to have any actual monopoly. If a party shall so conduct himself as to convince the people of any city or state that they can have the benefit of any particular interstate or foreign trade or commerce, only, by dealing with or through him, he is undoubtedly guilty of an attempt to monopolize such trade, a violation of this provision (Section 2) of the anti-monopoly Act of Congress, although he may in fact have no monopoly of such trade or commerce, and all of his pretenses thereof were false. Such pretenses are, essentially, attempts at monopoly of such trade and commerce prohibited by this provision (Section 2).

The testimony conclusively shows: That the defendant's agents had the common council of Kansas City and the board of aldermen of Westport fully convinced that the defendant had a complete monopoly of "Trinidad Lake asphalt" and of its use in these two cities, and that it was by pro-

ducing this conviction upon the minds of these city authorities that the defendant had secured all of the street pavement in Westport and all of the street pavement in Kansas City, under the Trinidad Lake asphalt specification for that pavement, except two short streets, aggregating about a quarter of a mile of pavement done by the Parker-Washington Co. in 1896.

The testimony further conclusively shows: that the only rival bidder for the street pavement in Kansas City and Westport, Missouri, from 1891 to the end of 1897, inclusive, that the defendant had for street pavement in these cities, was the Parker-Washington Co.

The testimony also conclusively shows: that the defendant in 1897 drove the Parker-Washington Co. out of the field of asphalt street paving in the two cities as a rival bidder under the "Trinidad Lake asphallt" specification, on the ground that the Parker-Washington Co. could not furnish the "Trinidad Lake asphalt" and that no one but the defendant could furnish asphalt from the Trinidad Lake for use in street pavement in Kansas City and Westport.

The testimony also shows: that the Parker-Washington Co. made a bid for the Main St. pavement (the first of the pavements) here in question; that its bid for this work was opposed by the defendant's agents, Hugh J. McGowan, and W. C. Scarritt before the public improvement committee of Westport; also that the bid of the Parker-Washington Co., which was lower than that of the defendant for the Main St. pavement, was rejected because the public improvement committee of Westport decided that the Parker-Washington Co. could not furnish "Trinidad Lake asphalt", and the contract in question was therefore awarded to the defendant; that the Parker-Washington Co. made no bid for the two other contracts in question which were let subsequently to the Main St. paving contract, and entirely ceased to bid against the defendant for asphalt street paving in Kansas City, Missouri, and Westport, Missouri, before the end of 1897.

These facts, and many more appear in "Section K", *ante* page 34.

It is respectfully submitted that the proximate cause of the defendant's procuring the contracts for the pavements in question were its acts of monopoly of "Trinidad Lake asphalt" in Kansas City, and Westport, Missouri, at and before the times in question, and that such acts were a violation of section 2 of the anti-monopoly act of Congress and vitiated the contracts for the pavements in question and the tax bills therefor.

IX.

The defendant did have a monopoly of "Trinidad Lake Asphalt" in Westport. No argument of the facts and circumstances stated and cited in Sections "K" and "L" is necessary to prove such monopoly. (*Ante* pages 34 to 48).

1. Why else would it be a matter of any concern to defendant's agents to procure this specification? The specification of "Trinidad Lake asphalt" could be no more fruitful to the defendant than a general specification of asphalt unless the defendant had a monopoly of "Trinidad Lake Asphalt" in Westport. The six years expense and effort put forth by defendant to procure this particular asphalt specification for street pavement in Kansas City and Westport, and defendant's procurement of all the work under this specification during that period of time, silences any denial of such monopoly at this time.

Boone v. City of Utica, 5 Misc. N. Y., 402-3.

2. Hugh J. McGowan, the agent of the defendant, aseserted and declared before a committee of the board of aldermen of Kansas City, Mo., at or about the times in question, in opposition to competitive bidding of the Parker-Washington Co. under the "Trinidad Lake asphalt" specification, that the Parker-Washington Co. could not furnish the "Trinidad Lake asphalt," and therefore could not com-

ply with the specifications; that the Parker-Washington Co could not furnish the "Trinidad Lake asphalt" for the rea son that they could not get it for use in Kansas City an vicinity unless they got it through the agent of the defend ant. (See printed record, pages 486-487). Should mor proof be required? The testimony cited in Sections "K and "L" shows conclusively that Hugh J. McGowan wa the agent and representative of the defendant in Kansa City and Westport in procuring the contracts for street pave ments, under the "Trinidad Lake asphalt" specification His declarations of the defendant's monopoly of the use o "Trinidad Lake asphalt" in Kansas City and Westpor was competent testimony on the issue as to defendant's mo nopoly, and being wholly uncontradicted and unexplained i sufficient to establish the allegation of such monopoly of de fendant.

State ex inf. v. Armour Packing Co. 173 Mo., 356

X.

The asphalt pavements were ordered and "Trinidad Lak Asphalt" was specified in the resolutions and ordinances o Westport, at the instigation and because of the lobbying an beguilement of the agents of the defendant, and not because o the exercise of any judgment of the board of aldermen o Westport upon these subjects. The tax-bills are therefor void.

The part of the record in this case, upon which th above proposition is based, is the following:

Pleading, allegations of the "6th" and "10th" charge of the original bill, quoted *ante* pages 5-6.

Proofs, stated and cited in "Section L" *ante* pages 4 to 48.

Errors, assigned by complainant to the judgment, num bered 11, 12, 13 and 14 (Pr. Rec. 27).

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In Missouri a municipal by-law is void and subject to attack for fraud of the aldermen or for fraud practiced upon them.

Morse v. City of Westport, 136 Mo., 276;
See also *Weston v. Syracuse*, 158 N. Y., 275;
San Antonio v. State, 22 Tex. Civ. App., 118;
Same case, 54 S. W. Rep., 289;
Oakland v. Carpentier, 13 Calif., 540;
Dillon Munic. Corp. (4th Ed.), Sec. 908 and Sec. 914.

As if to leave no doubt of the view of the Missouri Supreme Court on this proposition, that court recently said:

"It is true that in many jurisdictions, certainly in this state, it is true, that municipal acts, whether in form of ordinances or resolutions, may be impeached for fraud at the instigation of persons injured thereby (1 Dillon Mun. Corp. (4th Ed.) Sec. 311; *Glasgow v. St. Louis*, 107 Mo., 203). Whereas courts will not inquire into the motives of the legislature." *Barber Asphalt Paving Co. v. French*, 158 Mo., on page 547.

And this necessarily means a right to impeach such resolutions and ordinances for a fraud on the law or its requirements, *i. e.* when real wrong is not intended, as well as for fraud in fact.

Boon v. City of Utica, 5 Miscellaneous (N. Y.) 403-404;
Hersey et al v. The Board, etc., 37 Wis., 80;
Railroad and Telephone Cases v. Board of Equalizers, 85 Fed. Rep., 320;
Hill v. Swingley, 159 Mo., 45-50;
Brown v. First National Bank, 137 Ind., 667-8;
Elkhart County Lodge v. Crary, 98 Ind., 242.

For a fraud on the law is equally a subject of redress and relief.

Alexander v. Reilfe, 74 Mo., 518.

The resolutions and ordinances for the pavements in question are impeached by both legal and actual fraud:

1. The board of aldermen was authorized to initiate a street paving proceeding by resolution declaring the street pavement necessary, when, *and only* "When the board of aldermen shall deem it necessary to pave." The board was not authorized to declare necessary or order a street pavement to create work for a paving contractor. (Sec. 95). This charter provision and the general law of the land, alike, required, as indispensable to any valid resolution or ordinance for a street pavement, an exercise of judgment of the board of aldermen of the public necessity for each proposed street pavement and of the materials therefor, uncontrolled and uninfluenced by any private interest.

Burdsall v. Clark, 73 N. Y., 73;
Boon v. City of Utica, 5 Miscellaneous (N. Y.) 403-404;
Rickstrom v. City, 105 Wis., 605;
Russell v. St. Louis, 116 Mo., 248;
City of Rich Hill v. Donnan, 82 Mo. App., 386;
Brooks v. Cooper, 50 N. J. Eq., 761;
State v. City of Paterson, 34 N. J. L., 163;
Railroad and Telephone Cases v. Board of Equalizers, 85 Fed. Rep., 320;
Woodstock Iron Co. v. Extension Co., 129 U. S., 658-9.

In a recent case in the United States Court at Chicago, the action of the State Board of Equalization in assessing railway property was held null and void as a fictitious and arbitrary valuation of the property without the exercise of official judgment. In so holding, Judge Grosscup, sitting with Humphrey, district judge (See 114 Fed. Rep., on page 566) said:

"A substantial step in the taxing process is fixed by the law of Illinois; a step essential to the equal distribution of the burdens of taxation is the decision and judgment of

the State Board of Equalization. The board's place in the taxing system is that of a *quasi* judicial body. Its judgment affects, as keenly as that of any court, the property interests collectively, of the several districts of the state, and, directly and individually, of the persons and corporations owning franchises. No court can by its judgment, grasp more completely what would otherwise remain the property of the individual. In no other tribunal can there be found apter illustration of the power of the state to compel the individual to deliver up his property under the stress of law. It needs no argument to show that power, such as this, is only exercised rightly when exercised judicially. The prime quality of every judgment, without which it is no judgment, is that it is the final thought of the judge on the subject submitted, unaffected by extrinsic influences. This implies freedom of mind—not merely theoretically, but practically—the freedom of a mind that does not fear, that has no wish of its own, that sees nothing not seen through the lenses of the law. Judgments honestly made up in such atmosphere, though subject to review for error, are due process of law; judgments affected by fraud or fear, however solemnly entered, are as nothing, when weighed by the constitutional guaranties thrown around liberty and property.

"The sum of all this, as applied to the cases under consideration, is that the re-assessments complained of do not embody the real judgment of the board, in either the assessment or the equalization of the capital stock of complainants for the year 1900; and that in the absence of such real judgment, the threatened collection of taxes on the basis of the fictitious entry, would be to deprive complainants of their property without due process of law."

See also *Railroad and Telephone Cases v. Board of Equalizers*, 85 Fed. Rep., 320.

The recital in the resolutions for the pavements, that the board of aldermen deemed it necessary to pave the streets with "Trinidad Lake asphalt" was fictitious and only a *pro forma* attempt to make such a resolution as was called for by section 95 of the charter; it did not speak the real judgment of the board of aldermen which was a condition precedent to any right to adopt such a resolution. ("Section L" *ante* 42).

2. There is no charter provision requiring or authorizing a petition of resident owners of abutting lands for a street improvement. The charter requirement is that the board of aldermen shall initiate street improvements. The prerogative and only prerogative of owners of abutting land conferred upon residents is, *to prevent* a street pavement after it is proposed by the board of aldermen. No prerogative is conferred upon the property owners to act until the resolution of the board of aldermen declaring the necessity for the street pavement has been adopted and published (Sec. 95). It was a fraud on this provision of the charter for the agent of the defendant to solicit and secure a petition from the resident owners of abutting lands for the pavements, before the resolution therefor was adopted by the board of aldermen. It is illegal in a two-fold sense—*first*, it forestalled, and was doubtless intended to forestall, any protest from such residents against a pavement proposed by the board of aldermen according to such petition; *second*, it unduly influenced the board of aldermen to adopt the resolution declaring the pavements necessary and to prescribe material for the pavements favorable to defendant. What better excuse would a bribed alderman ask, with which to bewilder an abutting land owner incensed at being charged with a large assessment for an unnecessary pavement, than a citation to the petition produced for the work?

"All indirect or private methods of influencing public officials with respect to public business intrusted to them are immoral and against public policy."

Hayward v. Nordburg Mfg. Co., 85 Fed. Rep., 4;
Same case, with valuable note, 29 U. S. Ct. Ct. App., 446.
See also *Brooks v. Cooper*, 50 N. J. Eq., 761-771;
Elkhart County Lodge v. Crary, 98 Ind., 238.

3. Had the abdication of municipal judgment to the agents of the defendant, of the necessity of the street pavements and of the materials therefor, (the real reasons for the

adoption of the resolutions), been recited in such resolutions, they would be pronounced unauthorized and void, as have all such.

Cooley Const. Lim. (6th Ed.), 248-249;
Ewall's Evans on Agency, side pages, 41-42;
Mecham, Public Officers, Sec. 567;
Schumway v. Bennett, 29 Mich., 451, 464;
Ruggles v. Collier, 43 Mo., 353;
City of Rich Hill v. Donnan, 82 Mo. App., 386;
Neil v. Gates, 152 Mo., 594;
Russell v. St. Louis, 116 Mo., 248.

A state legislative provision would be void which expressly authorized the board of aldermen to thus abdicate to a paving contractor their judgment of what streets should be paved, when they should be paved, and how they should be paved, at the cost of abutting lands.

Cooley Const. Lim. (6th Ed.), 125, note 3; also 606-607;
Kean v. Driggs Drainage Co., 45 N. J., 91-95;
Matter of Tuthill, 163 N. Y., 133-138;
Woodward v. Central Vermont Ry. Co., 180 Mass., 599;
Powers v. Bergen, 2 Selden (N. Y.), 366-367;
Schumway v. Bennett, 29 Mich, 451, 464.

4. Surely, a board of aldermen cannot, by merely suppressing and keeping from the record of its proceedings, or by falsely reciting the facts and circumstances on which it acts, thus sustain in a false way corporate action not authorized by the city charter, or which, as done, could not have been authorized by the legislature.

Cooley Const. Lim. (6th Ed.), 125, note 3;
White v. City of Tacoma, 109 Fed., 32;
Railroad & Telephone Cases v. Board of Equalizers, 85 Fed. Rep,, 320;
Smith v. Lowe, 121 Fed., 753;
Knoppi v. Roofing & Paving Co., 92 Mo. App., 282;
City of Sedalia, Mo. v. Scott, 78 S. W. Rep ; 276. 279.
State ex rel Fennell v. Aldridge, 66 Ohio St. 599, 604.

Stockton, Atty Gen'l. v. Central RR. Co. 50 N.J. Eq. 52-

As aptly said, "There can be no greater power of the board to act of its own motion than by virtue of positive law."

Adams v. Brennan, 177 Ill., 201;
See also *Commonwealth v. Cambridge*, 7 Mass., 165-167;
Commonwealth v. Swin, 2 Pick., 547.

The board of aldermen were *pro hac vice* agents of the owners of abutting lands charged with the cost of the street pavements. Not merely the agents of such owners as were residents, but of all of the abutting owners.

Boon v. City of Utica, 5 Miscellaneous (N. Y.) 403-4.
McQuiddy v. Brannock, 70 Mo. App., 543;
Mayer, etc. v. Reynolds, 20 Md., 1.

Such agency being *in invitum*, the acts of the board of aldermen in the interest of the paving contractor ought to be the more subject to judicial scrutiny and defeat than if they were acts of a self-created agency of the individuals interested.

As agents, it was the duty of the board of aldermen to disclose and not conceal all or any of its illegal or unauthorized action in adopting resolutions and ordinances, or in making contracts for the pavements. The suppression from the face of these proceedings the fact that such resolutions and ordinances were adopted because of the petition of resident owners of abutting lands, procured and presented by the agent of the defendant, and because of the lobbying and undue influence of the agents of the defendant was *per se* a fraud of the board of aldermen upon the public, and particularly upon the owners of the abutting lands who had not signed any such petition and who had no knowledge of these things.

Emigrant Co. v. County of Wright, 97 U. S., 339;
McMullen v. Hoffman, 174 U. S., 639.

As agents, of the owners of lands abutting on the pavements, the board of aldermen were not authorized to declare necessary and order pavements of materials in the interest of the defendant, the adverse party.

Louis v. Slack, 27 Mo. App., 119;
Es. Ins. Co. v. Ac. Ins. Co., 138 N. Y., 449;
Harrison et al v. McHenry, 9 Ga., 168-169.

It is a fraud for an adverse party to beguile an agent with whom he is dealing, into favoring him rather than the principal for whom the agent is acting, and likewise a fraud for an agent to conspire or collude with a third party against his principal.

Hickman v. Green, 123 Mo., 176;
National Ins. Co. v. Minch, 53 N. Y., 144;
Musser v. Hyde, 2 Watts & S. (Pa.) 314;
Cooper v. Ford, 69 S. W. Rep., 487;
Woodstock Ins. Co. v. Extension Co., 129 U. S., 643.
Ottle v Bank, 75 Mo 103-4

5. *Lobbying by the defendant's agent with the board of aldermen for the resolutions, ordinances and contracts for the pavements, was essentially a fraud and one which vitiated the proceedings.*

"To legalize the traffic of such service would open a door at which fraud and falsehood would not fail to enter." *Trist v. Child*, 21 Wall., 451-2.

An equal privilege at bidding for public work *already ordered*, is the only right or privilege that properly may be said to belong to a contractor. It is certainly no right or legitimate privilege of a contractor, in person or by agent, to persuade public officials by private solicitation or by employing other private methods, that a new court house or a new city hall is needed, or that a particular street needs to be paved or repaved, with a view to getting the contract for the work, for obviously these, and the like public improvements are authorized only, upon the unbeguiled and unbiased official judgment, that they are needed for the public convenience.

The right of the public and the owners of the lands abutting upon a street, to the independent judgment of the board of aldermen, both as to the necessity and materials for a street improvement, is utterly inconsistent with any right or liberty of a paving contractor to employ agents to lobby with a board of aldermen to declare necessary or to order a street pavement with the material of a particular place, or at all. It is the duty of the municipality to declare necessary and improve only such streets as are necessary for the public convenience, and to make such improvements in a reasonable manner, but by the lobbying of an interested party, or his agents the municipal body may be persuaded and influenced to order and contract for needless and extravagant improvements, and to trespass upon individual rights. The tendency of lobbying is at least in that direction. It is for these reasons that this court, and all courts hold, that contracts which call for or contemplate lobbying service, are corrupt in their tendency and are contrary to public policy, and are therefore void, and that, too, "without reference to the question whether improper means are contemplated or used in their execution."

Twist v. Child, 21 Wall, 441;
McMullen v. Hoffman, 174 U. S., 648;
(A like agent). *Critchfield v. Bermudez Paving Co.*, 174 Ill., 466;
Mecham on Agency, Sec. 25. (A good collation of the authorities),
Brooks v. Cooper, 50 N. J. Eq., 772;
Veazey v. Allen, 173 N. Y., 359.

These authorities (and they are leading cases on the subject) hold that Hugh McGowan could not recover of the defendant any compensation for his services in procuring the paving contracts, because the contract to procure a contract from a city necessarily implies that lobbying with the municipal body is authorized and expected to be employed in the procurement of the contracts for public work. It

would seem to be law of only a most peculiar type which would deny Hugh McGowan any right of recovery for his services in procuring paving contracts for the defendant on the ground that such contemplated service was corrupt in its tendency and contrary to public policy, and yet hold contracts valid against innocent third parties, procured for the defendant by such illegal service. Such a confused and illogical state of the law is impossible. There can be but one logical and safe conclusion on this proposition, and that is the following: As Hugh McGowan's contract with the defendant for procuring the contracts for the pavements was tainted with illegality and unenforcible by him against the defendant because of the bare contemplation of lobbying, the paving contracts, which are the product of his lobbying, are likewise necessarily tainted and destroyed by the real thing. Defendant could not if it would, divorce its paving contracts from the lobbying and scheming of Hugh J. McGowan, or his assistants, by which such contracts were procured for the defendant. Defendant would not be permitted to say that it did not authorize the lobbying to procure such contracts.

Connecticut Mutual Life Ins. Co. v. Hillman, 188 U. S., 219, and cases cited;
State ex inf. v. Firemen's Fund Ins. Co., 152 Mo., 3-38;
Myerhoff v. Daniels, 173 Pa. St., 559;
Leonard v. Poole, 114 N. Y., 371.

"Irregularities on the part of an agent, employe, relative or intimate friend, will be imputed to the principal."

Finlen v. Heinze, 73 Pac. Rep., 130;
See also preceding authorities.

In *Finlen v. Heinze*, *supra*, the judgment of the trial court was reversed by the Montana Supreme Court for the lobbying of a female, a supposed agent of the winning party, with the trial judge. Besides, the contract between McGowan and the defendant—which necessarily implied that McGowan was to do lobbying to procure the paving con-

tracts—the length of time this method of procuring contracts for the defendant was followed by McGowan and his assistants in Kansas City and Westport, conclusively proves that such method was authorized by the defendant.

Sharp v. Knox, 48 Mo. App., 169;
Reynolds v. Collins, 78 Ala., 94.

Who questions that these three parallel pavements, only a block apart and each a mile long, in an outlying and largely unimproved district, would not have been ordered and contracted for with the defendant all within four month's time (*Ante*, 48-51) but for the alleged and proven arts and wiles practiced upon the board of aldermen by defendant's agents as lobbyists? (*Ante*, 42 to 48).

The board of aldermen of Westport never by resolution declared an asphalt street pavement necessary, except upon petition of resident owners of abutting lands, procured and presented by Hugh J. McGowan or his assistants; the board of aldermen always, by resolution, declared it necessary to pave a street with "Trinidad Lake asphalt" whenever Hugh J. McGowan or his assistants, procured and presented such petition, and always followed such resolution with a like ordinance ordering the work and with a like contract with the defendant therefor; Hugh J. McGowan or his assistants attended the meetings of the board of aldermen and spoke to the aldermen singly on the subject of the resolutions and ordinances, and treated them in the saloons in Westport before the sessions of the board, at the times when the matter of adopting the paving resolutions or ordinances aforesaid or the award of the contracts for the sixteen asphalt pavements laid by the defendant in the city of Westport, (including the times when the resolutions, and ordinances and contracts for the three pavements in question) were pending and were acted upon by the board of aldermen (*Ante*, 44 to 47).

"Who finds the heifer dead and bleeding fresh,
And sees fast by a butcher with an ax,
But will suspect 'twas he that made the slaughter."
—Part Second, Henry VI., Act III, Scene II.

This course of procedure implies even more than has yet been stated. It is as if the board of aldermen had said to the owners of the lands on every street in the city that no street would be paved, or ordered paved at all, until they arranged with the defendant's agent therefor. Imagine if, it can be imagined, the aldermen of two cities for six years, thus subservient to the scheme of monopolizing asphalt street pavement for defendant, a foreign corporation, all for nothing.

It is, however, not necessary to the invalidity of the resolutions, ordinances and contracts for the pavements to show, that they were wholly due to the lobbying and undue influence of the defendant's agent. The defendant's agent had no lawful right to stimulate or influence the action of the board of aldermen at all and defendant could not, if it would, make it a mere question of how much the lobbying of its agents stimulated or influenced the board of aldermen in declaring necessary, ordering and contracting for the pavements to save these municipal proceedings from illegality. It is not necessary that the court should enter into any calculation to ascertain the exact degree or extent these paving proceedings were due to defendant's lobbying. The fact that these municipal proceedings are chargeable at all with lobbying of defendant's agent, vitiates them altogether. "Where parties have woven a web of fraud or wrong it is said to be no part of the duty of courts of justice to unravel the thread." Byles on Bills, page 146.

See also *Henrioid v. Neusbaumer*, 69 Mo., 97;
Elkhart Co. Lodge v. Crary, 98 Ind., 238;
Trist v. Child, 21 Wallace, 452;
Finlen v. Heinze, *supra*.

Complainant Injured. 1. It is to be assumed that McGowan, who hired three assistants, maintained a separate office, and his controlling prestige with the muncipal bodies of Kansas City and Westport was adequately paid for procuring the paving contracts for the defendant. This ex-

pense to the defendant was doubtless added to the cost of the pavements, and charged against the abutting lands.

2. The complainant is further injured: His lands have been charged and beclouded with the cost of unneeded pavements, which would not have been ordered but for the lobbying of defendant's agents.

Point III, also point VII should be read, and considered along with this point, to bring out a full view of the law and facts on this proposition.

XI.

The asphalt pavement laid by defendant in 1897 on Wyandotte street, and on the part of Main street from 39th street to Westport avenue, was unreasonable and unauthorized because the macadam pavement then upon Wyandotte street or upon this part of Main street, previously laid by Westport and charged to the abutting lands, was then a good and substantial pavement and in no need of repair or replacement by another pavement for safe and convenient travel thereon. Hence, the tax-bills therefor against complainant's abutting lots are void.*

The parts of the record on which this ~~count~~ point is based, are the following:

Pleading, "Sixth charge" of the bill, *ante* page 5.

Proofs, stated and cited in "Section M" *ante* page 48.

Error, No. 10 of complainant's assignment of errors (Pr. Rec. 26).

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* *Such of this point as refers to Wyandotte street, relates to defendant's appeal, as the Wyandotte street tax-bills were declared void by the trial court (Pr. Rec. 24). For convenience it is embodied herein with the part of the Main street pavement questioned in error No. 10, assigned by complainant to the judgment.*

The part of Wyandotte street in question in defendant's appeal, was macadamized in 1893, by Westport and tax-bills therefor were issued against abutting lands, including those of complainant; this macadam pavement was in good condition and practically unworn in 1897, when the asphalt pavement in question was laid; the testimony is clear that no repair or replacement of the street was then needed for safe and convenient travel thereon. The same is true as to the south block of the Main street pavement in question, in complainant's appeal, to-wit: from 39th street to Westport avenue on which complainant's lots 1 to 5, block 45, front. See the positive and undisputed testimony to this effect, given by the following witnesses:

R. H. Field, Pr. Rec. pages 197-198, 345;
George L. Love, Id. pages 72, 84, 347-348-349, 386-387;

The court will observe, that none of the testimony above cited on this issue, except that on pages 386 and 387, was taken after any amendment to the bill.

J. C. Tate, Id. page 93;
A. D. Beedle, Id. (defendant's witness) page 284.

The resolutions, ordinances and tax-bills for the pavements in question on Wyandotte street and as to that block of Main street between 39th street and Westport avenue were therefore unreasonable, unauthorized and void.

See in point:
McFarland v. Chicago, 185 Ill., 242-252;
Hawes v. Chicago, 158 Ill., 653;
Same case, 57 N. E. Rep., 12;
Corrigan v. Gage, 68 Mo., 541:
Halpin v. Campbell, 71 Id., 493;
Cooley Const. Lim. (6th Ed.) 125, Note 3.

The principle on which such resolutions are held unauthorized and void is this: That all general grants of legislative authority are restricted with an implied limitation,

that such authority shall be exercised only in a reasonable manner, and that the exercise of such authority in any unreasonable or oppressive manner, is essentially *ultra vires.* It is on this principle that complainant stands in this point.

In *Wilkinson v. Leland* (2 Peters, 657), this court by Judge Story, said:

"The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice, in this country, would be warranted in assuming that the power to violate them (a power so repugnant to the common principles of justice and civil liberty) lurked under any general grant of legislative authority or ought to be implied from any general expression of the will of the people."

See also *Smith v. Ames*, 169 U. S., 466;
Smith v. Lowe, 121 Fed. Rep., on page 759;
State ex rel v. Lafayette Co., 41 Mo., 226.

The federal courts of equity can and will set aside all unreasonable, arbitrary and illegal acts and charges made under color of state authority.

Smith v. Lowe, 121 Fed. Rep., 753;
Smith v. Ames, 169 U. S., 466;
Reagan v. The Trust Co., 154 Id., 397-399;
Fallbrook Irrig. Dist. v. Bradley, 164 U. S., 159-160;
White v. City, 109 Fed. Rep., 32.

The necessity required by the Westport charter to authorize the board of aldermen to improve a street is a *public necessity.* The Missouri legislative act must be thus construed to save it from conflict with the constitution.

Morrison v. Morey, 146 Mo., 562;
In the matter of Tuthill, 163 N. Y., 133-138;
Mo. Pac. Ry. Co. v. Neb., 164 U. S., 403;
Fallbrook Irrig. Dist. v. Bradley, 164 U. S., 158-166;
Stratton Claimants v. Morris Claimants, 89 Tenn., 501-535.

With such constitutional protection it must follow that an abutting land owner charged with the cost of a repavement has the right to prove that there was no color of public necessity for such repavement.

Fall. Irrig. Dist. v. Bradley, 164 U. S., 159-160.

Complainant does not claim that if it were a question of whether a pavement should be repaired or replaced with another pavement, that he would have any right to question the discretion of the municipal authorities as to which should be done, viz: a repair or repavement, but his claim is this: when the Westport authorities had, in the years 1892 and 1893, paved respectively, Wyandotte street and the part of Main street, the south block of the pavement in question, with a macadam pavement, and assessed the whole cost thereof to the abutting lands, including his lands, no jurisdiction or municipal authority could or did attach which would warrant a repavement of these streets at the cost of the abutting lands, when this macadam pavement was not worn or displaced in any way to give color to a claim that the safe or convenient use of the highway fairly called for a repairing or replacement of the pavement thereon. Any less security than this would leave the owners of abutting lands without protection against the caprice and oppression of municipal authority. "The great purpose of the requirement (due process of law) is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." *Dent v. West Virginia*, 129 U. S., 124.

Complainant submits that the public necessity for a street pavement cannot be forestalled nor foreclosed against the owner of private property taxed for a street pavement,

beyond question, by any fiction or presumption of law, nor even by the fiat of the state legislature itself.

In Re Jacobs, 98 N. Y., 111-112;
Smith v. Lowe, 121 Fed. Rep., 753;
Fallbrook Irrig. Dist. v. Bradley, 164 U. S., 159-160;
Cooley Const. Lim. (6th Ed.) 606-607;
White v. City, 109 Fed. Rep., 32;
Vick Wo v. Hopkins, 118 U. S., 369;
Ragan v. Farmers Loan & Trust Co., 154 U. S., 399;
Cummings v. State of Mo., 4th Wallace, 325.

As appropriately remarked of the judicial prerogative, by Mr. Justice Holmes for the Supreme Court of Massachusetts, "We cannot invent fictions to save legislative acts."

Woodward v. Central Vermont Ry. Co., 180 Mass., 604;

Erroneous claims of fact by defendant on this point.

Judging from its "First" assignment of errors defendant may claim the complainant's bill does not allege that the pavements were unnecessary; such claim cannot be sustained. After describing the three pavements in question laid by defendant, the municipal resolutions, ordinances and contracts therefor, the "Sixth" charge of the bill contains the following allegation: "And the order for the work aforesaid, upon each of the three streets aforesaid, *was in each case not due to any necessity therefor.*" (*ante.* 5.)

Defendant filed no exception to the sufficiency of this allegation, but in its answer met it expressly as follows: "Defendant denies that the order for the work aforesaid upon each of the three streets aforesaid was in each case, or in any case, not due to any necessity therefor." (Pr. Rec. 11).

The *relevancy* of the testimony offered on this subject was not once objected to by the defendant.

"An imperfect averment, if it is to be the subject of exceptions, must, in the main, be brought to the notice of the court by a demurrer. It is but seldom, and only when the

statement is so vague and loose as to be utterly inert and inefficient, that it can be objected to at the final hearing." Beach's Modern Equity Practice, Sec. 108, and note.

See also *Tufts v. Tufts*, 123 U. S. 76;

Savings & Loan Soc. v. Davidson, 97 Fed. Rep., 703 and cases cited;

Nashua Savings Bank v. Anglo American Co., 189 U. S., 231.

Banking House of Nelson v. Darr, 139 Mo. 675

Complainant denies the statements in defendant's assignment of errors of matter *dehors* the record in this case, and to make such denial most specific complainant says: (1) It is not true that the issue as to the unnecessary repavement with asphalt in 1897, on Wyandotte street was not one tried and submitted to the court. (2) It is not true that the receiver in *Mastin v. Mastin*, (a different case) in the U. S. Circuit Court, at Kansas City, signed the petition for the work under any order of that court. (3) The statement that the United States Circuit Court at Kansas City, expressed any favorable judgment, or any judgment, or made any mention whatever of the Wyandotte street improvement is wholly untrue. (4) Neither is it true "that no property owner along the entire street protested, or attempted to protest against the improvement on Wyandotte street." (There was a minority protest of the residents.) (Pr. Rec. 168). (5) Nor is it true that any adequate allowance was made in the price of the asphalt pavement for the value of the macadam then in place. (The contract price for the Wyandotte St. pavement on the macadam was $2.00 per square yard; the contract price for the Baltimore avenue pavements was $2.10, per square yard, which included the cost of a 4 inch base of hydraulic concrete, thus showing that only 10c a square yard, gross, was allowed for the macadam, including the cost of resurfacing it, used as a base for the asphalt pavement.

The issues which complainant makes as to the other matters in defendant's assignment of error, will be made sub-

jects of separate and distinct points hereinafter. It is, however, now and finally submitted that there is no merit in defendant's appeal on the issue of the necessity for the Wyandotte street pavement, also that the testimony and the law equally required a decree for complainant on the same ground cancelling the tax-bills against lots 1 to 5, block 45 for the Main Street pavement for the reasons given in this point, which the trial court refused to complainant.

XIII.

The question of benefit of the pavements to complainant's property cuts no figure in this case.

Most of the testimony produced by the defendant was upon the issue tendered in the answer that the amount of benefit of the pavements to complainant's property was greater than the amount charged thereto for the pavements.

To this defense or counter-claim complainant replies:

First. The complainant does not reside and has no improvements on any of the lands fronting on the pavements. Complainant submits for the serious consideration of this court whether the testimony on this issue, properly viewed and weighed, shows the pavements to be of any real benefit to the complainant. The testimony of the witnesses on this issue, **given on complainant's re-examination and cross-examination,** shows sufficiently, without any comment, his cause for sorrow and regret that the pavements were ever laid. All of the testimony on this issue will be found abstracted in "Section N" of the topical statement of this case. (*Ante* pages 51 to 62.)

Now nearly seven years old, two years beyond the time they were guaranteed, of what value will the court assume the pavements are at this day to complainant's vacant property?

Second. The question of benefit to complainant's property is, however, a wholly immaterial issue. If the municipal paving proceedings were authorized the tax-bills would be valid, although the pavement was not one cent of benefit to the property charged.

McQuiddy v. Smith, 67 Mo. App., 205;
Moberly v. Hagan, 131 Mo., 19;
French v. Barber Asphalt Paving Co., 158 Mo., 556;
Same case, 181 U. S., 335; (Quotation from *Mattingly v. District of Columbia*).

Third. No promise of complainant to pay for the unauthorized pavements can be implied because of any supposed or even real benefit of the pavements to complainant's property.

See same proposition and authorities, *Ante*, 78.

Fourth. **Defendant has and can have no equity against the complainant in this case for the expense of laying the pavements, because of the frauds aforesaid, committed by the agents in the procurement of the contracts for the pavements**

"The law cares very little what a fraudulent party's loss may be, *and exacts nothing for his sake*. It will not undertake to indemnify him for the expenditures made in the prosecution of his fraudulent purpose."

Guckenheimer v. Angevine, 81 N. Y., 394.

"A court of equity must decline to assist him (in the language of Mr. Justice Story; 2 Story's Eq., 8) to escape from the toils which he has studiously prepared to entangle others."

Galloway v. Finley, 12 Peters, 297.

"The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who,

by deceit or unfair means, has gained an advantage. To aid a party in such a case would make this court the abettor." *Bein v. Heath*, 6 How., 247.

See also *Woodenware Co. v. United States*, 106 U. S., 432;
Henrioid v. Neusbaumer, 69 Mo., 97.

This doctrine is as applicable to an equity asserted by a defendant as much as if it were asserted by a complainant.

Bean v. Lake Superior Iron Co., 134 U. S., 531.

XIV.

There is no legal or equitable ground for any claim in this case that the complainant has been guilty of laches or that he is estopped to attack the special tax-bills in question. *

Pleadings and proofs (in full) on this issue are printed in "Section O," *Ante*, pages62-63.

This point is confidently submitted on what has been said and cited on these subjects as parts of Point I of this brief (*Ante*, pages 77 to 80).

* *The fraud on private right and official action, the frauds on the law and on the federal constitution itself, hereinbefore pointed out, can not find safe refuge in the law of estoppel or laches, enforced in courts of equity.*

XV.

This is a proper suit for the relief prayed.

The statute says the tax-bills in question shall be *prima facie* a lien on the lands.

Laws Missouri, 1895, page 85, Sec. 92 and Sec. 90 (quoted *ante* p. 24).

Hence, and as the special tax-bills are void for the facts *aliunde* aforesaid, this suit is a proper action to cancel and remove the said tax-bills as a cloud on complainant's title to the lands therein charged.

Rich v. Braxton, 158 U. S., 379;
Lyon v. Alley, 130 Id., 178;
Ogden City v. Armstrong, 168 U. S., 224, 240-1;
K. C.. Ft. Scott & Memphis Ry. Co. v. King, 120 Fed. Rep., 614;
Ormsby v. Ottman, 85 Fed. Rep., 492;
Perkins v. Baer, 95 Mo. App 70.
Hays v. Dowis, 75 Mo., 250;
State ex rel Baha v. Phillips, 97 Mo., 331.

A bill in equity will also lie to avoid a multiplicity of suits over the same matter: (There are 17 special tax-bills against as many different lots of land, involved in this case and there could be that number of suits on said tax-bills. Westport Charter, Sec. 88 and Sec. 92, *ante* pages 23-24).

Ogden City v. Armstrong, 168 U. S., 224;
Marshall v. Holmes, 141 U. S., 589;
Smith v. Ames, 169 U. S., 517.

Also to annul or restrain proceedings under an unconstitutional law.

Wilson v. Lambert, 168 U. S., 611;
Village of Norwood v. Baker, 172 U. S., 270;
Smith v. Ames, 169 Id., 466;
Pollock v. Farmers Loan and Tr. Co., 157 U. S., 429;
Deitz v. City, 91 Wis., 422.

Also to prevent the enforcement of statutory liens created in violation of the constitution.

R. R. and Telephone cases v. Board of Equalizers, 85 Fed., 302;

Nashville etc., R. R. v. Taylor, 86 Fed. Rep., 169-188.

It is too late for defendant to claim that complainant has any adequate remedy at law or other remedy.

Williams v. Monroe, 101 Fed., 323;

Book v. Justice Mining Co., 58 Id., 832.

A remedy in state court, provided by state statute, is no bar to equity jurisdiction in federal court, when there is diverse citizenship, or alleged violation of the federal constition.

Smith v. Reeves, 178 U. S., 444;

National Surety Co. v. State Bank, 120 Fed. Rep., 593.

XVI.

The United States Circuit Court had jurisdiction.

Diverse citizenship. The bill alleges that complainant is a citizen of Missouri and resides in Kansas City, and that the defendant is a private corporation of West Virginia (*ante* 2). The answer admits this allegation (Pr. Rec. 7-8). This diverse citizenship gave complainant a right to sue defendant in the district of the United States Circuit Court where complainant resides.

McCormack v. Walthers, 134 U. S., 341;

Barnes v. Western Union Telegraph Co., 120 Fed., 550;

Fairbanks & Co. v. Ry. Co., 54 Fed. Rep., 420;

Desty New Federal Procedure, Sec. 87.

Violation of federal constitution alleged. The bill alleges: That the city charter of Westport, under which the tax-bills complained of were issued to defendant, violated

section 1 of article XIV (*ante* pages 3-4); and that the resolutions and ordinances for the pavements in question violated section 8 of article I, of the federal constitution (*ante* page 6).

These allegations made a case for the exercise of the jurisdiction of the circuit court of the United States.

Scott v. Donald, 165 U. S., 58;
Smith v. Ames, 169 U. S., 466;
Wilson v. Lambert, 168 U. S., 611;
Walla Walla City v. Water Co., 172 U. S., 1;
Cummings v. Chicago, 188 U. S., 410;
Union & Planters Bank v. City of Memphis, 111 Fed. Rep., 561.

Amount in dispute more than $3,000.00 exclusive of interest and costs.

The seventeen special tax-bills for the three pavements held by defendant, and attacked herein, aggregate $3,376.45 (see *ante* 16). The aggregate of the principal sums of these special tax-bills exceeding $2,000.00, made a sufficient amount in dispute to authorize this suit in the United States Circuit Court, *though no one of said tax-bills amounted to that sum.*

Marshall v. Holmes, 141 U. S., 589;
Fetchette v. Blows, 74 Fed. Rep., 47;
Freeman Stribling Shoe Co. v. Roper, 94 Id., 739;
O'Connell v. Reed, 56 Id., 531;
Pacific Live Stock Co. v. Hanley, 98 Id., 327;

The issue on the amount involved. The particular issue upon the amount involved in this case is a denial in defendant's answer of complainant's title, to the eight lots, in block 45, of the seventeen lots of land, against which the special tax-bills, aggregating $3,376.45, were issued.

Complainant's title to the seventeen lots of land. The answer admits the allegations of the bill that complainant owns, and owned at the times in question, the following de-

scribed lots and parts of land in Hyde Park, Westport, Missouri, to-wit: lots 1, 2, 7, and 8, block 39; lots 3 and 4, block 41; lot 1, block 49; the south 15 17-100 ft. of lots 1 and 2 in block 50; but the allegations of the bill that complainant owns and owned at the times in question an undivided ½ of lots 1, 2, 3, 4, 5, 8, 9 and 10 in block 45 is denied by defendant's answer.

(See allegations of the bill of complainant's lands, Pr. Rec., 1.

See admission and denial of complainant's title in defendant's answer, as above stated, Pr. Rec., 8).

The defendant's answer thereupon sets out the amount of the special tax-bills against the lots of land in severalty and in gross and shows what appears in the petition, viz: that $1,583.23 is the amount of the special tax bills against the 8 lots in block 45. To this extent and in this manner only was the jurisdiction of the United States Circuit Court put in issue by the defendant, to-wit, by denial that complainant owned an undivided ½ of the 8 lots in block 45, or any other interest therein.

Complainant showed that he owned an undivided ½ of the lots in block 45, the interest alleged in the bill, and was in actual possession thereof, by undisputed and unquestioned testimony. **See "Section C"** *ante* **17.**

Nature of his title to the lots in block 45.

Though the deed was made to Annie Camp Field, the legal title to the undivided half of the lots in block 45, having been bought and paid for by complainant for his own use, was *ipso facto* in complainant *by the statute of uses.*

In point *Fellows v. Ripley et al.* 69 N. H. 410; *s. c.* 45 Atlantic Rep. 138.

The Missouri Statute of uses, reads as follows: (R. S. 1899, Sec. 4589.)

"Where any person or persons stand or be seized, or at any time hereafter shall stand or be seized, or and in any lands, tenements or hereditaments, to the use, confidence or

trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, covenant, contract, agreement, will or otherwise, by any manner of means whatsoever, in every such case all and every such person or persons, and bodies politic that have, or hereafter shall have, any such use, confidence or trust, in fee simple for term of life or of years, or otherwise or any use, confidence or trust, in remainder or reversion, shall from thenceforth stand and be seized, deemed and adjudged in lawful seizin, estate and possession of and in the same lands, tenements and hereditaments, with their appurtenances, to all intents, constructions and purposes in law, of and in such like estates, as they had or shall have in use, confidence or trust of or in the same; and that the estate, right, title and possession that was or shall be in such person or persons, that were or hereafter shall be seized of any lands, tenements or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politic, be found henceforth clearly deemed and adjudged to be in him, her or them, that have or hereafter shall have such use, confidence or trust, after such quality, manner, form or condition as they had before in or to the use, confidence or trust that was or shall be in them." (See first declaration of trust Pr. Rec. page 201).

No particular form required to declare a trust.

It does not have to be acknowledged before an officer.

It is even held sufficient if it be informally stated in an ordinary letter to the beneficiary or to any other person.

Perry on Trusts, sections 81 and 82.

Tiedeman on Real Property (Enlarged Edition) Sec. 506.

Resulting trust may be proved by parol testimony alone.

When the purchase money of land is paid by husband and title put in wife's name with the understanding that she

was to hold it for the husband, the beneficial title is in the husband *and this may be shown entirely by parol evidence.*

Teideman on Real Property Sec. 507;
Smithsonian Institute v. Meech, 169 U. S. 399;
Siebold v. Chrisman, 7 Mo. App., 254;
Same case, affirmed, 75 Mo., 308.

The writing aforesaid of the wife of complainant, if ineffective as a declaration of the trust, is certainly competent as evidence of a resulting trust in complainant.

Siebold v. Chrisman, 7 Mo. App., 256;
See also the 2nd declaration of trust. (Pr. Rec. 203.)

The question of complainant's title to a part of the lands in question being only an equitable title, does not make a question of jurisdiction of the circuit court in this case.

This proposition is *dehors* the pleadings and assignment of errors, and is here noticed only because the trial judge's opinion shows *it was the point of non-jurisdiction* of the court, made by defendant (Pr. Rec., 516-517). This question goes only to the right of complainant to sue and does not go to the jurisdiction of the circuit court, *raised in the defendant's answer and assignment of errors.*

Blythe v. Hinckley, 173 U. S., 501;
Huntington v. Laidley, 176 U. S., 668;
Illinois Central Ry. Co. v. Adams, 180 U. S., 28-35.
Louisville Trust Co v Knott 24 Sup Ct Rep 119

Defendant cannot avail himself of any objection to complainant's maintaining this suit because of the character of complainant's title to the lots in block 45, because the particular facts on which the objection is based are not raised by plea.

Stock Yards Co. v. L. & N. R. R. Co., 67 Fed. Rep., 35-40;
Beach's Modern Eq., Sec. 330, note 3.

However, and whatever the nature of the point may be, it must fail because such matter must be raised by plea

or demurrer and cannot be raised in the answer, even if set up with precision. The Supreme Court of the United States ruled and said, in *Livington's Executrix v. Storey*, 11 Peters, 352-393:

"It now only remains for us to dispose of the defendant's protests, *in the beginning of his answer, against the jurisdiction of the court in this case.* The twenty-third rule of this court for the regulation of equity practice in the circuit courts has been relied on to show that it is competent for the defendent, instead of filing a formal demurrer or plea, to insist on any special matter in his answer; and have the same benefit thereof as if he had pleaded the same matter, or had demurred to the bill. This rule is understood by us to apply to matters applicable to the merits, and not to mere pleas to the jurisdiction, and especially to those founded on any personal disability, or personal character of the party suing, or to any pleas merely in abatement. In this respect it is merely affirmative of the general rule of the court of chancery; in which matters in abatement and to the jurisdiction, being preliminary in their nature, *must be taken advantage of by plea, and cannot be taken advantage of in a general answer, which necessarily admits the right and capacity of the party to sue.* 1 Summer's Rep., 506 *v.* Mann."

See also *Stock Yards Co. v. L. & N. R. R. Co.*, 67 Fed. Rep., 40;
Beach's Modern Eq., Pr. Sec. 293 and Sec. 299.

Defendant has waived and cannot restore any issue or objection to complainant's title to the lots in block 45.

Not a question was asked by the defendant on the issue tendered in the answer as to complainant's title and interest in the lots in block 45, but after the complainant's unquestioned testimony on this issue, the defendant took over 200

pages of depositions on other issues in the case, which are in the transcript filed in this case (See index to testimony taken by defendant in the printed record filed herein).

Moreover, the solicitor for the defendant, in eliciting proof from defendant's witnesses in the said depositions taken and filed in this case by defendant, propounded questions which in form assumed and conceded that complainant owned all of the tracts of land described in the bill, including the lots in block 45, and in some of these questions by name conceded complainant's title to the lots in block 45. (See "Section D," *Ante*, 19-20).

It is respectfully submitted that this conduct and course of procedure by the solicitor for the defendant was a waiver and abandonment of the issue made in his answer on the complainant's title to the lots in block 45, and that such issue cannot be revived by the defendant.

Walker v. Owen, 79 Mo., 563;

California Electrical Works v. Frick, 47 Fed. Rep., 583;

North Chicago Street Ry, Co. v. Burnham, 102 Fed. Rep., 669.

The finding and decree adjudged that the complainant owns all of the lots of land alleged and described in his bill. No error was assigned by defendant to this part of the finding and decree. The defendant was willing enough to let the judgment and decree stand adjudicating the validity of the special tax-bills against the eight lots in block 45. The issue as to complainant's title to the eight lots in block 45 should stand as adjudicated by the decree, and as though no appeal was taken, because no error in such adjudication has been assigned, and because, as above claimed, the defendant waived and cannot restore the issue on the complainant's title to the lots in block 45.

XVII.

Complainant's right to bring and prosecute this suit is not at all impaired or affected by the fact that his interest in the eight lots in block 45 may be deemed only an equitable title, or be less than the whole title.

(1) The cases which may be cited by the defendant enforcing the chancery rule, requiring the complainant to have the legal title and actual possession of lands to authorize a suit to quiet title were in suits between conflicting claimants of the *title* to the land, and in states where they had no such statute as in Missouri. Not one of them was a suit to cancel the cloud of only an apparent lien. Not one of the reasons given for requiring the legal title and actual possession of the property to authorize a suit to quiet title or to remove the cloud of a conflicting claim of title, fairly applies to an attack on a special tax-bill. It is clear that the ancient chancery rule, invoked by defendant, is only a general rule and always had its exceptions, and that the rule or the reason thereof never did apply to such a case as this.

Beadle v. Mead, 81 Mo., 297, l. c., page 303;
Ins Co. v. Smith, 117 Mo., 262;
Jones v. Smith, 22 Mich., 365; (paragraph II);
Danhl v. Rumheim, 132 U. S., 262;
Smith v. Orton, 21 How. U. S., 241;
Louisville Tr. Co. v. Stone, 107 Fed. Rep., 305;
Shofield v. Ute Coal Co., 92 Fed. Rep., 269;
Reiner v. McKay, 35 Id., 86;
Allen v. Holliday, 25 Id., 638;
Elk Fork Oil Co. v. Jennings, 84 Id., 838;
Shaw v. Dwight, 27 N. Y., 244;
Miller v. Cook, 135 Ill., 190, 26 N. E. Rep., 750;
Beck Lumber Co. v. Rup, 188 Ill., 562, *s. c.* 59, N. E. Rep., 429.

(2) Since the Missouri act of 1897, (now Section 650, Revised Statutes of 1899), it can never be held necessary that a complainant suing to remove a cloud on the title to his land shall be in actual possession of such lands, or that he shall own the legal title or the whole title thereto.

This Missouri statute reads as follows:

"Sec. 650. **Suits to determine interests and quiet title, how and when instituted.** *Any person claiming any title, estate or interest in real property, whether the same be legal or equitable,* certain or contingent, present or in reversion, or remainder, whether in possession or not, *may institute* an action *against any person or persons having or claiming to have any title, estate or interest* in such property, whether in possession or not, to ascertain and determine the estate, title and interest of said parties, respectively, in such real estate, and to define and adjudge by its judgment or decree the title, estate and interest of the parties severally in and to such real property."

With this statute the owner of the equitable title only to land, and that, too, whether in or out of possession thereof, can maintain a suit, to quiet his title thereto, or to remove a cloud thereon, and these enlarged rights of persons interested in lands, created by state statute, are also enforced in the Federal courts. The only difference or exception in the Federal court being that it will not entertain such a suit under such a statute when the defendant is in the actual possession of the land and the plaintiff would have a complete, plain and adequate remedy at law against him.

Wehrman v. Conklin, 155 U. S., 314, 323;
Greely v. Low, Id., 58;
More v. Steinback, 127 U. S., 70 84;
Reynolds v. Crawfordsville Bank, 112 Id., 405;
Hollen v. Challen, 110 U. S., 15;
Arnot v. Griggs, 134 Id., 316;
Grant v. Phoenix Co., 121 U. S., 112;
Hauring v. Rice, 80 Fed. Rep., 162;

Grand Rapids & I. R. Co. v. Sparrow, 36 Id., 210;
Bigelow v. Chatterton, 51 Id., 614;
Ormsby v. Ottman, 85 Id.. 492;
Southern Pine Co. v. Hall, 105 Id., 84;
Huff v. Land & Imp. Co., 57 S. W. Rep., 715; *s. c.* 157 Mo., 65;
Bell v. Woolfork, 175 Mo., 275;
Fox v. Williams, 66 N. W. Rep., 357, *s. c.* 92 Wis., 320.

And defendant, as the owner of the tax-bills in question, claiming them as liens on the lands of the complainant, is, *within the meaning of this statute*, "a person having or claiming to have an interest in such property," and as such is subject to this action. The precise question was decided by the 8th Circuit Court of Appeals as follows: "A state statute empowering a person claiming title to real estate to bring and maintain a suit to quiet his title against a person or persons who claim an 'adverse estate or interest' therein, authorizes the maintenance of such a suit *against any person who claims an adverse* right, title, or interest in or *lien upon, the real estate* in question."

Ormsby v. Ottman et al, 85 Fed. Rep., 492;
See also *Blair v. Hemphill*, 111 Ia., 226;
Chapman v. Brewer, 114 U. S., 170;
Bell v. Woolfolk, 175 Mo., 275-285.

"This statute is highly remedial and beneficial in its purpose." (*Bell v. Woolfolk*, 175 Mo., 285).

The Supreme Court of Wisconsin, interpreting a like statute, has held and declared that such a statute was to be liberally construed and enforced.

Fox v. Williams, 92 Wis., 320.

A bill in equity is a proper remedy under such a statute.

Bigelow v. Chatterton, 51 Fed. Rep., 614;
Bardon v. Land & Improvement Co., 157 U. S., 330;
Reynolds v. Crawfordsville, 112 U. S., 405;
Greeley v. Lowe, 155 U. S., 59.

*The complainant's bill, filed in this case, contains all necessary allegations for relief under this statute.**

(1) The bill alleges, that the complainant owns the 17 named lots of land in Hyde Park, Westport, Missouri ("second" charge Pr. Rec. 1).

(2) The bill also alleges, that the defendant holds a special tax-bill against each of said lots of land of complainant "and that the defendant claims that the said special tax-bills are liens respectively upon and against the real estate aforesaid." ("Third" charge Pr. Rec. 2).

No other allegation is necessary to entitle the complainant to maintain this suit under this Missouri statute.

Union Mill & Mining Co. v. Warren, 82 Fed. Rep., 519;
Ely v. New Mexico, etc. R. R. Co., 129 U. S., 291;
Parley's Park Mining Co. v. Kerr, 130 U. S. 260-1;
Book v. Mining Co., 58 Fed. Rep., 827;
Bell v. Woolfolk, 175 Mo., 278;
Mitchell v. McFarland, 47 Minn., 535;
Palmer v. York, 77 Minn., 20;

XVIII.

The right of complainant to maintain this suit is not lessened nor affected by the fact that he owns only an undivided one half (½) of the 8 lots in block 45.

(*a*) Independent of the statute, (Sec. 650 *supra*) *a tenant in common can sue alone* for any injury to the freehold or to remove a cloud on the title and a petition is not

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* *Defendant filed neither a demurrer nor an exception to complainant's bill for insufficiency on this, or on any other score.*

demurrable for defect of parties because his co-tenants are not made parties to the action.

Goldsmith v. Gilliland, 24 Fed. Rep., 154;
Hicklin v. Marco et al, 56 Id. 549 and on page 555;
The Debris case, 16 Id. 26-34;
Union Mill & Milling Co. v. Danberg, 81 Id. 73;
Davis v. Davis, 89 Id. 533;
Adams et al. v. Howard et al, 22 Id. 658-9;
Williams v. Crabb, 117 Id. 193;
Payne v. Hook, 7 Wall 425;
Horn v. Lockhart, 17 Id. 570;
Platt v. Squire, 12 Metc. (Mass.) 494:
Hang v. Primeau, 98 Mich. 92, 95 and 96;
Hang v. Primeau, 57 N. W. Rep. 25-27;
Sheehan v. Great Eastern Ry. Co., 16 Ch. Div. (Eng.) 59;
O'Donnell v. McIntyre, 37 Hun. (N. Y.) 616;
Affirmed in 116 N. Y. 663.

(*b*) It is only by statute that a tenant in common is permitted to pay his share of the *general* taxes levied against a tract of land owned by himself and others. After so holding the court of appeals then says: "This reasoning *does not apply to the special tax-bill*, which if paid at all, was bound to be paid as an entirety."

Horstmeyer v. Connors, 56 Mo. App., 121;
See also *Jones v. Van Doren*, 130 U. S., 692;
Searle v. Chapman, 121 Mass., 19;
Micklin v. Marco, 56 Fed. Rep., 555;

(*c*) The holder of a valid tax-bill has the option of enforcing the lien for the full amount of the same by suit against a single tenant in common of the land against which the tax-bill is issued.

Granite Co. v. Taylor, 64 Mo. App., 37.

Why shouldn't a single tenant in common have a corresponding right to attack the tax-bill, alone by suit in equity?

He has. See authorities cited under paragraph (*a*) *supra*. See also Mo. R. S., 1899, Sec. 650 quoted *ante* 168.

Bill not multifarious.

What has already been said renders it useless to now argue the question of the multifariousness or misjoinder of matters in the bill. However, it would seem to follow, that as a tenant in common of real estate *can alone* maintain a suit in equity to remove a cloud on the title to the lands of himself and others, that there could be no logical or legal objection to including therein, other property belonging solely to himself, when the title to the latter property is clouded by the same party and by the same illegal subject-matter.

Beach's Modern Equity Practice, Sec. 129;
Story's Eq. Pl. (9th Ed.) Secs. 285 and 536;
Ulman v. Ialger, 67 Fed. Rep. 980;
Platt v. Squire, 12 Metc. (Mass.) 494;
Whitfield & Billups v. Evans, 56 Miss. 500;
Perkins v. Baer, 95 Mo. App., 70.

Too late for defendant to object to misjoinder of causes or multifariousness.

Fichett v. Blows, 74 Fed., 47;
Chew & Goldsborough v. Bank, 14 Md., 299;
Wade v. Pulsifer, 54 Vt., 70;
Labidie v. Hewitt, 85 Ill., 342;
Veghte v. The Routon P. Co., 19 N. J. Eq., 142-144-145;
Green v. Richards, 23 Id., 32;
Annin v. Annin, 24 Id., 184;
Buffalow v. Buffalow, 2 Ired. Eq., 113;
Wales v. Newbould, 9 Mich., 81;
Payne v. Avery, 21 Mich., 524;

Hickman v. Cook, 3 Hump. (Tenn.), 640;
Thurdman v. Shelton, 10 Yerg. (Tenn.), 382;
Oliver v. Piatt, 3 How. (U. S.), 411-412;
Nelson et al. v. Hill et al., 5 Id., 126;
Barney v. Latham, 103 U. S., 215.

"Although the court may take objection (multifariousness or misjoinder of causes of action in a bill) it will not do so unless it deems such a course necessary or proper to assist in the due administration of justice."

Barney v. Latham, 103 U. S., 215, and cases cited.

"When the trouble and expense, which a demurrer for multifariousness if well taken would have been prevented, have been incurred, and the case is fully presented on the record, the court should not interfere and take the objection *sua sponte*."

Chew & Goldsborough v. Bank, 14 Md., 299;
See also *Smith v. Gooch*, 6 Lea (Tenn.), 536.

Judge Story speaking for the Supreme Court says, in *Oliver v. Piatt*, 3 How., 412:

"And at so late a period as the hearing, so reluctant is the court to countenance the objection, that, if it can get on in the cause to a final decree without serious embarrassment, it will do so disregarding the fault or error when it has been acquiesced in by the parties up to that time. A *fortiori* an appellate court would scarcely entertain the objection if it was not forced upon it by a moral necessity."

To the same effect:
Welborn v. Tiller, 10 Ala., 305;
Wade v. Pulsifer, 54 Vt., 71;
See also *Luckett v. White et al.* 10 G. & J. (Md.), 480.

Non-joinder or defect of parties not stated in the answer.

The complainant alleges that he owns lots in Hyde Park addition, against which the tax-bills complained of have been issued, as follows:

All of lots 1, 2, 7 and 8 in block 39; also all of lots 3 and 4, block 41; also all of lot 1, block 49; also the south 17

feet of lots 1 and 2, block 50; *also an undivided half of lots 1, 2, 3, 4, 5, 8, 9 and 10 in block 45.* (See bill charge "second" *ante* page 2).

The answer admits that complainant owns all of said lots except *the undivided half of the lots in block 45*, claimed by complainant in his bill. There is no allegation in the answer naming any absent person, as interested in these lots, in block 45, or as necessary or proper parties to this action. No defect of parties is alleged or suggested therein. As to these lots in block 45, the answer only tenders the issue that complainant had no title and no interest therein. (See answer, Pr. Rec. p. 8).

Too late for defendant to object to any defect of parties.

A defect of parties when appearing on the face of a bill must be taken advantage of by demurrer to the bill. When such defect does not appear upon the face of the bill, any objection, on that score, must be raised by answer.

See Equity Rule No. 52, U. S. Courts.

The defendant answering, without so objecting to the bill filed, is to be deemed a waiver of any and all such objections (if there be any) to the bill as filed in this case, and it is now too late for the defendant, especially since the defendant, by its answer, has put the great labor and expense upon complainant of taking and printing testimony in support of the entire bill. In such case it is said to be the duty of the court to make a decree if it can do so (and it can) without prejudice to any absent party. It is also said that it can make no difference that a defendant, who has hitherto not objected, might be prejudiced thereby.

See Equity Rule No. 53 of the United States Courts.
See particularly on the proposition last stated;
Elmendorf v. Taylor, 10 Wheaton, on pages 166-167;
Mechanics Bank v. Seton, 1 Peters, 299;
Railroad v. Harris, 12 Wall, 66;

Keller v. Ashford, 133 U. S., 610; (also page 626);
Burbank v. Bigelow, 154 Id., 558;
McGahan v. Bank, 156 Id., 236;
Adams v. Howard, 22 Fed. Rep., 656;
Seccomb v. Wurster, 83 Id., 856;
Story, Eq. Pleadings, § 542;
Freeman, Co-tenancy and Partition, Sec. 353, *et seq*;
Smith v. Gooch, 6 Lea (Tenn.) 536;
Smith v. Bartholomew, 42 Vt., 356;
Schwoerer v. Boylston Market, 99 Mass., 295;
Starne v. Farr, 17 Ills. App., 491;
Sheenan v. Great Eastern Ry. Co., 16 Ch. Div. (Eng.), 59.

NOTE.—The above cited state court decisions are based upon the chancery practice as existing anterior to or exclu. sive of the code practice.

In *Schwoerer v. Boylston Market Association*, *supra*, the Massachusetts court accurately expressing *the rule stated and enforced in the other cases*, said:

"When the defect is formal and technical merely, and is only objected to at the hearing, and especially if other parties are needed only for the defendant's protection, the decree will not be delayed, if the non-joinder produces no other prejudice to the rights of the parties before the courts. It is the familiar rule that some defenses cannot be made in all stages of the cause with equal effect, but will be regarded as waived when expense and delay have been incurred which might have been avoided." (99 Mass., 295).

XIX.

It is now respectfully submitted that the special tax-bills for each of the 3 street pavements are void and should be so declared herein, and that the part of the judgment and de-

cree for the defendant, which adjudged valid the special tax-bills for the Main street and Baltimore avenue pavements, and costs to defendant, should be reversed.*

RICHARD H. FIELD,
in Person.

** The motion of complainant to dismiss defendant's appeal, submitted to the court on October 26th, 1903, is yet undecided. On Monday, Nov. 2nd, 1903, the court made an order announcing that this motion would be acted upon with the merits of the case. Complainant's Printed Brief, in support of that motion, is on file therewith in this court. To paragraph 4, on page 11 of which brief complainant asks to be added, the decision of this court in Anglo American Provision Co. v. Davis Provision Co., 24 Sup. Ct. Rep., 93.*